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CASE NO.

in the

Supreme Court

of the

United States

October Term, 1980

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I

DOES FLORIDA'S SYSTEM OF TERRITORIALLY DISTINCT FINAL APPELLATE COURTS, EACH WITH ITS OWN SUBSTANTIVE LAW, DENY EQUAL PROTECTION?

II

IS JURY TRIAL IN CIVIL CASES A RIGHT FUNDAMENTAL TO THE AMERICAN SCHEME OF JUSTICE, WHICH THE STATE CANNOT, CONSISTENT WITH DUE PROCESS, DENY TO PETITIONER?

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CONSTITUTIONAL PROVISIONS INVOLVED

Fla. Const. art. V, §3(b) (1968 Revision as amended 1980):

> Jurisdiction — The supreme court:
>
> (1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.
>
> (2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.
>
> (4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance,

or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) May issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction.

(8) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

Fla. Const. art. V, §4(b) (1968 Revision, as amended 1972):

Jurisdiction.

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

(2) District courts of appeal shall have the power of direct review of administrative action, as prescribed by general law.

(3) A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court. A district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction. To the extent necessary to dispose of all issues in a cause properly before it, a district court of appeal may exercise any of the appellate jurisdiction of the circuit courts.

U.S. Const. amend. VII:

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. XIV, §1:

Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OPINION BELOW

The opinion below is reported: *Ethyl Corp. v. Balter*, 386 So.2d 1220 (Fla. 3d DCA 1980), *petition for review denied*, 392 So.2d 1371 (Fla. 1981).

JURISDICTION

The Florida Third District Court of Appeal entered its decision July 8, 1980, and denied rehearing without opinion September 4, 1980. The Florida Supreme Court denied the petition for discretionary review on January 21, 1981.

This petition for writ of certiorari is filed pursuant to 28 U.S.C. §1257(3). 28 U.S.C. §2403(b) may be applicable.

STATEMENT OF THE CASE

David Balter sued Ethyl Corporation for tortious interference with contract. The jury, on a special interrogatory verdict, found that Ethyl had interfered with actual malice, and awarded Balter $1,020,450.

Ethyl appealed to the Florida Third District Court of Appeal. That court reversed and directed a judgment in Ethyl's favor. In so ruling, the court (1) rewrote the facts, in complete derogation of the jury's province, and (2) adopted a substantive rule of law (that interference to protect one's own interest, even with actual malice, is absolutely privileged) contrary to that of other Florida district courts.

Balter moved for rehearing, urging that the decision (1) violated his right to a jury trial under the Federal and Florida Constitutions and (2) was contrary to the precedents of Florida's other district courts. The court denied that motion without opinion.

Balter then petitioned the Florida Supreme Court for discretionary review, urging the only available ground: conflicting precedents among the district courts. The supreme court denied that petition without opinion, and (by rule) permitted no rehearing.

STATEMENT OF THE FACTS

The Florida Third District Court of Appeal re-examined the facts and rendered a verdict against Balter. The court rejected some facts and accepted others, resolved factual disputes and drew factual inferences in Ethyl's favor, and came to a different factual conclusion from that of the jury. Based on its own version of the facts, the court then made legal conclusions against Balter, which it could not have done had it accepted the jury's findings.

Balter claimed, and the jury believed, that Ethyl, a large polyethylene film producer, manipulated Pac-Craft, a film converter half-owned and managed by Balter, in an eventually successful effort to control Pac-Craft and oust Balter. Ethyl, Balter claimed, knowingly sent Balter defective film, deceiving him with empty promises to make up the losses with credits to purchase good film. (T. 3771-73, 3811-18, 3827, 4024-25; P. Ex. 64, 56, 59) Through skillful maneuvering, Ethyl controlled Pac-Craft's cash flow and its film supply, caused it to default on a bank loan Ethyl had arranged, coerced the bank to call the loan, and took over Pac-Craft's stock. (P. Ex. 64, 55, 56, 59, 69, 58; T. 1018, 4024-25, 3770-75, 3802) Ethyl then persuaded Balter to put Pac-Craft into a Chapter XI bankruptcy proceeding by promising to transfer all of Pac-Craft's stock to him if his plan succeeded. (T. 3868-69, 3897, 3899-3900, 3915, 3918-19, 4041-47; P. Ex. 20) Finally, Ethyl eliminated Balter altogether by causing his plan of arrangement to collapse and ending his employment with Pac-Craft. (T. 917-18, 3933, 1044-45, 1893-1905)

Balter claimed, and the jury believed, that Ethyl acted deliberately and used improper and dishonest means, in a well-conceived plan to take over Pac-Craft, oust Balter, and avoid liability. Yet the Third District's opinion states:

> During the late 1960's, Pac-Craft encountered severe financial difficulties which primarily included its inability to pay its outstanding account with Ethyl, by far its largest creditor. As a result, Pac-Craft negotiated a $450,000 loan from the City National Bank of Miami, (CNB), which was personally guaranteed both by Balter and Stanley Fromm, the owner of the other half of Pac-Craft, and which was secured by their stock in the company. The only reason the bank agreed to the loan was that Ethyl guaranteed it. Ethyl had decided, rather than forcing Pac-Craft into bankruptcy, instead to attempt to preserve the existence of an important customer in the hopes of receiving a greater return on its outstanding balance and of securing future business as well. In March of 1969, however, Pac-Craft defaulted on the loan. In accordance with the guarantee agreement, the CNB debt was satisfied by Ethyl which was assigned both the pledged Pac-Craft stock and the personal guarantees of Balter and Fromm.

The evidence believed by the jury, however, shows that Pac-Craft's financial difficulties resulted directly from Ethyl's supplying and charging Pac-Craft for defective polyethylene film. (T. 3771-73, 3811-18, 3827,

4024-25; P. Ex. 64) At the time of the bank loan, Pac-Craft was not near bankruptcy; it was in fact contemplating expansion. (T. 3802-09) Ethyl proposed the loan, to finance Pac-Craft's expansion. (T. 3770-75, 3802) Months before the loan, Ethyl was contemplating the forced acquisition of Pac-Craft. (P. Ex. 69) The conditions Ethyl attached to the loan intentionally put Ethyl in a position to destroy Balter's control of Pac-Craft. (P. Ex. 56, 59, 64) Then, after driving Pac-Craft to the financial brink, (T. 3822-23, 3826-29) Ethyl coerced the bank to call the loan. (P. Ex. 55)

The Third District states:

> At all times, Ethyl's actions were reasonably directed to the recovery of the very substantial sums it was owed by Pac-Craft, to the protection of its status as the co-obligor with the corporation on a $450,000 loan it was later required to pay, and, finally, as the lawful holder of 100% of its stock.

The evidence believed by the jury, however, shows that Ethyl acted not to protect its interests, but to acquire or control Pac-Craft. Ethyl's memoranda show a continued intent to *increase* Ethyl's interest (either through a direct take-over, a substitution of a manager loyal to Ethyl, or a liquidation), *not* to preserve an existing interest. (P. Ex. 69, 64, 56, 59, 58)

The Third District states that:

> Balter, however, was unable to produce an additional $34,000 which was necessary to fund

> the plan which had been finally approved by the Chapter XI bankruptcy court and by Ethyl and the Pac-Craft creditors' committee which Ethyl dominated as the control creditor.
>
> * * *
>
> Initial plans of reorganization submitted by Balter, . . . would have required no or substantially less monies to fund, but . . . would also have brought Ethyl far less return on its outstanding claim.

But the evidence the jury believed shows that Ethyl's maneuvers forced up the amount of cash required *not* by $34,000, but by almost $100,000. (T. 3940; 4009-19) Balter therefore could not fund the plan.

Moreover, Ethyl induced Balter to begin the Chapter XI proceeding by promising it would accept his first plan of arrangement. (T. 3868-69, 3897, 3899-3900, 3915, 3918-19) Ethyl defeated that plan, and then kept "moving back the goal posts," forcing Balter to submit ever-higher plans, (T. 1033-34) and finally bringing a competitor into Pac-Craft's files (in violation of a bankruptcy court order) to obtain data to submit a liquidation proposal. (T. 3933, 1044-45, 1893-1905) Balter was finally unable to keep up with Ethyl's machinations.

The Third District states that Ethyl used no "improper means" in destroying Balter's relationships. The evidence the jury believed, however, shows that Ethyl induced Balter to put Pac-Craft in bankruptcy by falsely promising Pac-Craft's stock and its support of

his plan of arrangement. (T. 3868-69, 3897, 3899-3900, 3915, 3918-19, 4041-47; P. Ex. 20) Ethyl instead solicited a competitor to prepare and submit a liquidation offer (although a Chapter XI proceeding is not intended to be a liquidation) by misrepresenting Ethyl's relationship with Balter, Pac-Craft's financial condition, and the meaning of the Chapter XI proceeding. And in order to aid the competing offer, Ethyl violated an express bankruptcy court directive protecting Pac-Craft's files. (T. 1884-85, 1911, 1044-45, 1893-1905)

The Third District states:

> [Ethyl's] activities were not directed against Balter or his relationship with Pac-Craft at all, but merely to the corporation itself.

But the evidence the jury believed shows that Ethyl always acted for the purpose of ousting Balter from Pac-Craft so that it could substitute itself or someone it controlled in his place. Ethyl's memoranda never once speak of injuring Pac-Craft, but do show a complete disregard for Balter's individual rights. (P. Ex. 55, 56, 58, 59, 69)

The Third District also states that Balter released his claims against Ethyl in return for a release of his guarantee on the CNB note. But, as the jury correctly found, no releases were in evidence at trial and no releases were to be exchanged at all until Balter completed his plan (which never happened). (P. Ex. 14)

In sum, every finding of fact favorable to Balter which the jury could and did make is supported by

evidence in the record. Every legal conclusion in the Third District's opinion is bottomed on a Third District finding of fact different from the jury's.

REASONS FOR ALLOWANCE OF THE WRIT

I

FLORIDA'S CREATION OF FIVE APPELLATE DISTRICTS, EACH FREE TO DEVELOP ITS OWN SUBSTANTIVE LAW, DENIED BALTER'S RIGHT TO EQUAL PROTECTION

The Florida appellate system denied David Balter a $1 million jury verdict, because he lives in Miami, rather than elsewhere in Florida — in violation of his fourteenth amendment right to equal protection.

The district court reversed Balter's jury verdict by adopting a substantive rule of law different from that of Florida's other districts.[1] The supreme court then refused review.

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[1]The jury found that Ethyl interfered with Balter's contracts and business expectancies, *with actual malice*. The Third District ruled that a person with a financial interest in the subject of his interference has an absolute privilege — that interference is actionable only if done "solely" for malice. The Third District's rule is contrary to that of Florida's Second and Fifth Districts, the Restatement, and the weight of judicial authority. *See* Serafino v. Palm Terrace Apartments, Inc., 343 So.2d 851, 852 (Fla. 2d DCA 1976) (interference privileged only if "without malice"); Insurance Field Serv., Inc. v. White & White Inspection and Audit Serv., Inc., 384 So.2d 303 (Fla. 5th DCA 1980) (whether interference is actionable depends on a balancing of the respective interests, purposes, motives, and means); Restatement (Second) Torts §§766-774 (1979); 1 F. Harper and F. James, The Law of Torts, §6.12 (1956); W. Prosser, Handbook of the Law of Torts, §129 (4th ed. 1971).

Each of Florida's five district courts has final appellate jurisdiction within its own domain. There is no appeal as of right to the supreme court, even where, as here, the districts develop conflicting substantive law. The resulting difference in common law rules is not based on any rational consideration of varying local concerns. It is based instead on arbitrary territorial lines.

Balter does not claim a constitutional right to an appeal. Nor does he claim a right to an appeal to the same judges as persons elsewhere in the state. But he does have a right to have Florida law applied free of unreasoned territorial distinctions. Florida's failure to provide an appeal as of right to its supreme court where its districts adopt conflicting substantive rules of law has denied Balter that right.

Florida's district courts were created by constitutional amendment[2] in 1956, with appellate jurisdiction from most trial court decisions. The supreme court's jurisdiction was at the same time circumscribed,[3]

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[2]Fla. Const. art. V, §4 (1968 Revision, originally numbered §5).

[3]Fla. Const. art. V, §3 (1968 Revision, originally numbered §4).

making district court decisions final, with limited discretionary review in the supreme court.[4]

The supreme court ascribed to these amendments an intent to relieve its workload.[5] The court initially construed the amendments broadly, to maintain uniformity of precedent,[6] but subsequently adopted a more restrictive interpretation. The supreme court now hears appeals

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[4]This appellate structure resembles the federal system — a totally inappropriate model for the states. State appellate courts make laws. Within the course of adjudicating the rights of individual litigants, each appellate court develops that state's common law — a law-making power similar to that of the legislatures.

There is no corresponding, all-encompassing federal common law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). The federal courts are by definition courts of limited jurisdiction. Their role as the ultimate interpreter of federal law cannot be questioned. *See, e.g.*, Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803); U.S. v. Nixon, 418 U.S. 683, 703-05 (1974). But the federal courts do not make laws as do the state courts.

Moreover, even within the federal system, this Court has recognized the importance of avoiding conflicting precedents. *See* Sup.Ct.R. 17.1(a); 13 Moore's Federal Practice ¶817.21 (1981) and cases cited therein.

[5]Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958) ("The revisions and modernization [were] prompted by the great volume of cases reaching the Supreme Court . . . .").

[6]*See* Foley v. Weaver Drugs, Inc., 177 So.2d 221, 230 (Fla. 1965) (Drew, J., concurring specially) ("[I]t would result in utter chaos . . . if it were impossible for this Court to maintain consistency and uniformity of the law in such cases.").

as "a matter of grace, carrying with it no guarantee that the desired review will be granted."[7]

This Court has stated that the Federal Constitution does not guarantee any litigant an appeal, so long as "a full and fair trial on the merits is provided." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).[8] Nevertheless, while

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[7] 1 A. England & T. Simon, Florida Appellate Practice Manual §2.12 (1980). Ultimately, the constitution was further amended to restrict litigants' access to Florida's supreme court. For a discussion of the history of these provisions co-authored by Florida Supreme Court Justice Arthur England, *see* England, Hunter, and Williams, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 Fla.L.Rev. 147 (1980).

[8] Without courts of appeal, however, common law jurisprudence would be frozen in the 18th century. Any notion that the states' judicial systems dispensed justice would have long ago disintegrated in the resulting chaos, as trial courts sought to deal with 19th and 20th century problems using horse-and-buggy precedents. *See* Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971):

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner.
>
> * * *
>
> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common law model. It is to courts, or other quasi judicial official bodies, that we ultimately look for the implementation

appellate review might not be a constitutional guarantee, "it is now fundamental that once established, those avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).[9]

Judicial resolution of private disputes is largely a matter of state, and not federal, concern. But, as noted

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(Footnote 8 Continued)

> of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original constitution, in the fifth amendment, and later those who drafted the fourteenth amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the state's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.

[9]*Accord*, Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Griffin v. Illinois, 351 U.S. 12 (1956). *Compare* U.S. v. MacCollum, 426 U.S. 317 (1976); Ross v. Moffitt, 417 U.S. 600 (1974).

This rule applies to civil as well as criminal proceedings. Lindsey v. Normet, 405 U.S. 56 (1972) (requirement of Oregon landlord-tenant statute that appealing tenant provide double supersedeas bond violated equal protection, despite argument that added requirement was reasonably related to valid state objectives to insure landlords against loss and to screen out frivolous appeals).

in *Boddie v. Connecticut*, 401 U.S. 371 (1971),[10] access to the states' machinery for resolving private disputes lies at the heart of an ordered society. The states' control over conflict resolution "could hardly be said to be acceptable" "without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law." 401 U.S. at 375.[11] Petitioner submits that such access should be recognized as a "fundamental right," and that any distinctions in providing such access should require a compelling state interest — which is manifestly absent.

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[10]In *Boddie* this Court held that the due process clause prohibited Connecticut from conditioning access to its courts by indigents seeking a divorce on the payment of court fees and costs. Noting that the Court had seldom been required to address access to civil proceedings as an element of due process, the Court nevertheless held that the "meaningful opportunity to be heard" applies to civil plaintiffs "forced to settle their claims of right and duty through the judicial process." 401 U.S. at 377.

Justice Harlan's opinion, although not necessarily his rationale, was itself limited to divorce, as "the exclusive pre-condition to the adjustment of a fundamental human relationship." 401 U.S. at 383. Justice Brennan, concurring in part, wrote that the decision should apply to access for any civil proceeding. Subsequently, in U.S. v. Kras, 409 U.S. 434, 447 (1973), the Court declined to extend *Boddie* to a voluntary bankruptcy petition, noting that there is no right to a bankruptcy discharge in the Constitution, which merely authorizes Congress to establish bankruptcy laws.

[11]*Accord*, Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907):

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly

But even if access to courts is not a fundamental right, Florida's appellate system still cannot pass constitutional muster.

Any distinction drawn by a state among its residents must bear a rational relationship to some legitimate state objective.[12] Florida's appellate system and the resulting arbitrary application of different substantive rules of common law cannot meet this standard.

(Footnote 11 Continued)

> government. It is one of the highest and most essential privileges of citizenship . . . .

See also Allstate Ins. Co. v. Hague, ___ U.S. ___, 101 S.Ct. 633, 647-48 (1981) (Stevens, J., concurring in the judgment):

> The forum State's interest in the efficient operation of its judicial system is clearly not sufficient, however, to justify the application of a rule of law that is fundamentally unfair to one of the litigants . . . . Concern about the fairness of the forum's choice of its own rule might arise if that rule favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied.
>
> The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law.

[12]*See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("our decisions . . . require . . . that the classification challenged be rationally related to a legitimate state interest."); Johnson v. Robison, 415 U.S. 361, 374-75 (1974).

Territorial classifications are afforded no special treatment under the equal protection clause. Any geographic line-drawing by a state must be reasonably related in fact to local concerns. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court upheld a "Sunday closing statute" prohibiting specified activities but exempting some localities. The Court concluded that because the traditional civil purposes behind such laws varied by locale, the territorial distinctions were not invalid. 366 U.S. at 523, 537 n. 138. Similarly, in *North v. Russell*, 427 U.S. 328 (1976), this Court upheld a statute providing for lay judges for police courts in smaller towns, finding the distinction reasonably based on smaller case loads, scarcity of lawyers, and limited financial resources. And in *Salsburg v. Maryland*, 346 U.S. 545 (1954), this Court held a statute excepting one county from a prohibition against admission of illegally procured evidence in gambling prosecutions reasonably related to differing crime and enforcement problems among the localities.[13]

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[13]*See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40, 49 (1973) (Texas school-financing system based on local property taxation upheld, in deference to "the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests" and the "persistence of attachment to government at the lowest level where education is concerned."); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) (while equal protection does not always require territorial uniformity, "the object must be a constitutional one."). Territorial distinctions have been subjected to strict scrutiny where they impinge on the fundamental right to interstate travel, which should apply as well to intrastate travel. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974) (statute requiring one year county residence as condition to free non-emergency medical care held unconstitutional; individual plaintiff

Streamlining appeals might be a legitimate state objective justifying procedural innovations, and possibly even a rational reduction of appellate review. A state cannot, however, obtain even legitimate objectives by drawing arbitrary territorial distinctions in its substantive law.[14]

(Footnote 13 Continued)

had moved from outside state, thus invoking interstate travel cases, requiring a compelling state interest; but, the Court noted that it did not reach the question of whether "to draw a constitutional distinction between interstate and intrastate travel. . . ."); *See also* Vlandis v. Klein, 412 U.S. 441 (1973); Dunn v. Blumstein, 405 U.S. 330 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969). *Compare* Sosna v. Iowa, 419 U.S. 393, 406 (1975) (one-year durational residence requirement for divorce actions "may reasonably be justified on grounds other than purely budgetary considerations or administrative convenience," and thus does not violate equal protection).

[14]An early equal protection decision, Missouri v. Lewis, 101 U.S. 22 (1880), upheld the creation of separate appellate districts. *Lewis*, however, is not controlling. The petitioner in *Lewis* challenged the creation of a separate appeals court for the St. Louis vicinity, with a further appeal to the Missouri Supreme Court only in specified cases. This Court did not look for or find a rational basis, holding instead that the equal protection clause could not apply to territorial distinctions.

The holding in *Lewis* cannot survive this Court's subsequent decisions: any distinction must have some reasonable relationship to a legitimate state objective. The decision has been cited recently only for the proposition that such distinctions are not absolutely prohibited. *See, e.g.*, McGowan, 366 U.S. 420.

Lewis is distinguishable not only by its early vintage, but also by the failure of the facts in *Lewis* to present an actual conflict in controlling law within the state. The petitioner in *Lewis* contended only that the denial of supreme court review deprived him of "the superiority of the wisdom and power" of that

Florida may well have wide discretion to tailor its judicial system to the unique circumstances of its varied communities. But, it has not done so here. Instead, Florida has arbitrarily divided itself into five separate common law jurisdictions. The common law of the Third District is no longer the common law of the other districts. The equal protection clause forbids such an unreasoned distinction.

The "logical extreme," *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1906), of Florida's supposed innovation crashes into the due process clause. Are "minimum contacts" now required in one district by a resident of another? What law does a district apply to a cause of action arising in another? *Cf. Allstate Ins. Co. v. Hague*, ___ U.S. ___, 101 S.Ct. 633 (1981).[15]

In Florida's Third District, a person can interfere with another's contract, maliciously and with complete impunity, so long as he expects to gain from his malfeasance. In the First and Fifth Districts, on the other hand, the malefactor would be liable in tort.

The difference cost David Balter more than $1 million. He had no right of further appeal, and was *sub silentio* found unworthy of "grace" by the Florida Supreme Court.

(Footnote 14 Continued)

tribunal. Balter, on the other hand, has been subjected to a substantive rule of law at variance with that prevailing in Florida's other districts.

[15]Florida has in effect divided its judiciary into five separate states. Congress alone can create states. U.S. Const. art. IV, §3.

Balter respectfully submits that the Florida Supreme Court's refusal to hear this case on the merits is a "patent miscarriage of justice,"[16] and a plain violation of the equal protection clause.

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[16]Estate of Wilson v. Aiken Indus., Inc., __ U.S. __, 99 S.Ct. 366, 367 (1978) (Blackmun, J., concurring in denial of certiorari, "with substantial discomfort;" the Pennsylvania Supreme Court had affirmed a judgment notwithstanding that a majority concluded it was erroneous; Justice Blackmun joined because the due process objection was not properly raised below).

II

THE FLORIDA THIRD DISTRICT COURT OF APPEAL DEPRIVED BALTER OF HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL.

The Third District's reversal is based on its reevaluation of the jury's findings on disputed facts.

Over 34 years ago, this Court last held that the Federal Constitution does not guarantee civil litigants a jury trial in state court. *Fay v. New York*, 332 U.S. 261 (1947). The Court should reconsider that holding and bring it in line with subsequent decisions and modern constitutional law.[17]

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[17] *See* Malloy v. Hogan, 378 U.S. 1 (1964) (applying guarantee against self-incrimination to the states); Pointer v. Texas, 380 U.S. 400 (1965) (right of confrontation); Douglas v. Alabama, 380 U.S. 415 (1965) (right to cross examination); Washington v. Texas, 388 U.S. 14 (1967) (right to present witnesses in one's defense); In re Winship, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt); Cantwell v. Connecticut, 310 U.S. 296 (1940) (right to free exercise of religion); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961) (right to free association); Ker v. California, 374 U.S. 23 (1963) (protection against unreasonable search and seizure); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Benton v. Maryland, 395 U.S. 784 (1969) (prohibition against double jeopardy); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial clause); In re Oliver, 333 U.S. 257 (1948) (right to a public trial).

In a split decision, a three-judge district court held in Melancon v. McKeithen, 345 F.Supp. 1025 (E.D. La. 1972) that there was no constitutional right to trial by jury, but that even if there were such a right, Louisiana's civil procedures did not destroy it, but only modified it in accordance with fair procedures analogous to those of the Federal Rules of Civil Procedure. This Court affirmed without opinion. 409 U.S. 943 (1972); 409 U.S. 1098 (1973).

In *Duncan v. Louisiana*, 391 U.S. 145 (1968), this Court ruled that the due process clause of the fourteenth amendment requires a jury trial in criminal cases, holding that the fourteenth amendment incorporates those guarantees of the Bill of Rights which are "fundamental to the American scheme of justice." 391 U.S. at 149.

In determining whether a right is "fundamental to the American scheme of justice," this Court examines both its historical importance and its present status. *Benton v. Maryland*, 395 U.S. 784, 795 (1969).

Each of the thirteen original states guaranteed a civil jury trial.[18] When the Federal Constitution was first submitted to the states, one of the biggest objections to it was that it did not secure the trial of facts by a jury in civil cases and the prohibition against appellate re-examination of facts. *See U.S. v. Wonson*, 28 Fed. Cas. 745, 750 (C.C.D. Mass. 1812). As this Court stated in *Parsons v. Bedford*, 3 Pet. 433, 446 (1830):

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[18]Ga. Const. of 1777 art. LXI, in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws 785 (F. Thorpe ed. 1909); Md. Const. of 1776 art. III, in 3 *id.* at 1686-87; Mass. Const. of 1780 art. XV, in 3 *id.* at 1891-92; N.H. Const. of 1784 art. XX, in 4 *id.* at 2456; N.J. Const. of 1776 art. XXII, in 5 *id.* at 2598; N.Y. Const. of 1777 art. XLI, in 5 *id.* at 2637; N.C. Const. of 1776, Declaration of Rights, art. XIV, in 5 *id.* at 2788; Pa. Const. of 1776, Declaration of Rights, art. XI, in 5 *id.* at 3083; S.C. Const. of 1778 art. XLI, in 6 *id.* at 3257; Va. Const. of 1776, Bill of Rights, §11, in 7 *id.* at 3814; Capital Traction Co. v. Hof, 174 U.S. 1 (1899). The Northwest Ordinance of 1787 guaranteed jury trial in civil cases in territories west of the Appalachians. Northwest Ordinance of 1787 art. II, in 2 Federal & State Constitutions, at pp. 960-61.

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general *as to establish its importance as a fundamental guarantee of the rights and liberties of the people.*[19]

Historically, the common law guarantee of a jury trial and the prohibition of an appellate court's defeating

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[19]*Accord,* Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935):

> The right of trial by jury is of ancient origin, characterized by Blackstone as 'the glory of the English law' and 'the most transcendent privilege which any subject can enjoy'. . . . Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

that right by substituting its own fact-findings[20] were "fundamental to the American scheme of justice."

The present importance of trial by jury is at least as great as its historical underpinnings. This Court has not only safeguarded but expanded the right to jury trial. *See Ross v. Bernhard*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500 (1959).[21] And more recently, in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980), the

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[20]Wonson, 28 Fed. Cas. at 750:

> [A]ccording to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is being, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. *This is the invariable usage settled by the decisions of ages.* Upon a writ of error, the appellate court can examine in general errors of law only, and never can re-try the issues already settled by a jury.

[21]"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care." 359 U.S. at 501, quoting Dimick v. Schiedt, 293 U.S. 474.

court firmly rejected an attempt to carve a "complexity exception" out of the seventh amendment.[22]

The unwavering and uniform attachment of the federal and state courts to the jury system underscores its continued importance to the American scheme of justice.[23] In his dissent in *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322 (1979), Justice Rehnquist traced the history of trial by jury in civil cases and summarized its importance to litigants:

> The founders of our Nation considered the right of trial by jury in civil cases an important

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[22]609 F.2d at 430:

> The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not accept such an assertion. Jurors, if properly instructed and treated with deserved respect, bring collective intelligence, wisdom, and dedication to their tasks, which is rarely equalled in other areas of public service.

[23]*See* McKeiver v. Pennsylvania, 403 U.S. 528, 548 (1971), quoting Snyder v. Massachussetts, 291 U.S. 97, 105 (1934):

> The fact that a practice is followed by a large number of states is . . . plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'

Accord, Burch v. Louisiana, 441 U.S. 130 (1979); *Duncan*, 391 U.S. at 158; *Benton*, 395 U.S. at 795; Baldwin v. New York, 399 U.S. 66, 72-73 (1970).

bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary . . . . Trial by a jury of layman rather than by the sovereign's judges was important to the founders because juries represent the layman's commonsense, the 'passional elements in our nature'; and thus keep the administration of law in accord with the wishes and feelings of the community.

* * *

It is precisely because the Framers believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign's judges, that the Seventh Amendment was adopted. And I suspect that anyone who litigates cases before juries in the 1970's would be equally amazed to hear of the supposed lack of distinction between trial by court and trial by jury . . . .

The right to a jury trial plainly is "fundamental to the American scheme of justice," and should therefore be held applicable to the states.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

Guy B. Bailey, Jr., and
Jesse C. Jones, *counsel of record for Petitioner*, and
Sara Soto, *of counsel*.

Appendix

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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1980

ETHYL CORPORATION, a Foreign Corporation,
Appellant,

vs.

DAVID BALTER,
Appellee.

CASE NO. 78-994

Opinion filed July 8, 1980.

An Appeal from the Circuit Court for Dade County, Francis X. Knuck, Judge.

Britton, Cohen, Kaufman, Zinkow, Benson & Schantz and John L. Britton, for appellant.

Bailey & Dawes and Guy B. Bailey, Jr., for appellee.

Before HENDRY, HUBBART and SCHWARTZ, JJ.

SCHWARTZ, Judge.

Ethyl Corporation, one of several defendants below, appeals from a final judgment for large amounts of compensatory and punitive damages entered in favor of the plaintiff, David Balter. The judgment was entered on a jury verdict which, in answer to a special

interrogatory, found that Ethyl had maliciously interfered with Balter's advantageous business relations. Upon the conclusion that the evidence establishes as a matter of law that Ethyl committed no such tort, we reverse the judgment below and order that one be entered for the appellant instead.

Balter's claims for damages stem ultimately from the loss of his interest in, and employment opportunities with Pac-Craft Corp., a now-defunct Dade County concern, of which he was once the president, chief operating officer, and owner of 50% of the capital stock. Pac-Craft was engaged in the processing and printing of polyethylene film. It obtained the vast majority of its primary raw material, the film itself, from Ethyl, one of the largest manufacturers of that product in the country. During the late 1960's, Pac-Craft encountered severe financial difficulties which primarily included its inability to pay its outstanding account with Ethyl, by far its largest creditor. As a result, Pac-Craft negotiated a $450,000 loan from the City National Bank of Miami (CNB), which was personally guaranteed both by Balter and Stanley Fromm, the owner of the other half of Pac-Craft, and which was secured by their stock in the company. The only reason the bank agreed to the loan was that Ethyl guaranteed it. Ethyl had decided, rather than forcing Pac-Craft into bankruptcy, instead to attempt to preserve the existence of an important customer in the hopes of receiving a greater return on its outstanding balance and of securing future business as well. In March of 1969, however, Pac-Craft defaulted on the loan. In accordance with the guarantee agreement, the CNB debt was satisfied by Ethyl which was assigned both the pledged Pac-Craft stock and the personal guarantees of Balter and Fromm.

Free now to direct the affairs of Pac-Craft as it wished, Ethyl entered into an agreement with Balter[1] under which he would receive back all of the Pac-Craft stock and be released from his personal guarantee if he were able to effectuate a reorganization of Pac-Craft under Chapter XI of the Bankruptcy Code. In order to comply with this agreement by supplying sufficient funds to achieve a satisfactory Chapter XI plan, Balter entered into a separate contract with a financier named Paul Wolf, who was represented by John Scussel. This agreement called for Wolf to provide $170,000 of partial funding to Pac-Craft in return for making Wolf a director of the company, and granting him the option to purchase 48% of the stock upon Balter's receipt of all the shares from Ethyl. Balter, however, was unable to produce an additional $34,000[2] which was necessary to fund the plan which had been finally approved by the Chapter XI bankruptcy court and by Ethyl and the Pac-Craft creditors' committee which Ethyl dominated as the

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[1]Fromm relinquished all interest in his stock in return for the release of his personal guarantee, and was not made a party to this action.

[2]This occurred because, at the last minute, the Pan American Bank of Hialeah refused to lend Balter the money. See Balter v. Pan American Bank of Hialeah, 383 So.2d 256 (Fla. 3d DCA 1980). Balter claimed that this action resulted in part from the failure of his attorney, Robert Frank, timely to supply the documents demanded by the bank as preconditions to the loan. See Balter v. Frank, _____ So.2d _____ (Fla. 3d DCA 1980) (Case no. 78-1019, opinion filed this date). Balter claimed that all of these acts, as well as those of Ethyl, Wolf, and Scussel, were wrongful and that all, acting together in a sort of grand conspiracy, were jointly responsible for the loss of "his" company, Pac-Craft.

control creditor.[3] Wolf then withdrew $100,000 of the $170,000 he had deposited with the court, dooming Balter's plan to failure. Subsequently, Wolf, supposedly in order to protect the remaining $70,000 he could not withdraw, himself financed the entire amount necessary to reorganize Pac-Craft. Thereafter, he received all of the stock from Ethyl, which he held until he sold his holdings in 1971. Wolf's plan involved a payment to creditors of some 37% of the outstanding indebtedness. Ethyl thus lost more than $300,000 out-of-pocket in its dealings with Balter and Pac-Craft.

In December, 1969, Balter filed suit against Wolf, alleging a breach of their agreement because of Wolf's withdrawal of the $100,000. Two years later, Balter filed an amended complaint against several more parties-defendant, including Ethyl. The only counts against Ethyl which now concern us alleged (1) a breach of contract, based upon Ethyl's refusal to approve initial plans of reorganization submitted by Balter, which would have required no or substantially less monies to fund, but which would also have brought Ethyl far less return on its outstanding claim; and (2) "malicious interference with contract and with reasonable business expectancies." The latter count was, apparently, primarily based on an alleged interference with the Balter-Wolf agreement, because of Ethyl's solicitation from others of subsequent and more favorable offers to reorganize. Balter claimed that the submission of such an offer by the Smart-Pac Corp. made it necessary for him to sweeten "his" plan

[3]Pac-Craft owed Ethyl over $500,000, more than 75% of its outstanding indebtedness.

by the additional $34,000 he subsequently was unable to raise. It was thus claimed that Ethyl had thereby become responsible for Wolf's withdrawal of his funds in breach of his contract.

After a three-week trial, the jury found in favor of Ethyl on the breach of contract claim.[4] As to the interference count, however, the jury answered "yes" to a special interrogatory which asked "Do you find that Ethyl Corp. maliciously interfered with *the* contract or with reasonable business expectations of David Balter, which was a legal cause of loss to David Balter?" Ethyl's appeal results from the judgment entered pursuant to this conclusion.[5]

While Ethyl's attempted interference with the Balter-Wolf contract was apparently the primary tortious act upon which the plaintiff relied below, the trial involved

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[4]Balter has cross-appealed from the judgment below, arguing, inter alia, his entitlement to a directed verdict on this count. We hold, to the contrary, that the verdict on this issue is completely supported by the evidence and that the other points raised in the cross-appeal likewise present no error.

[5]Wolf was held liable on both breach of contract and interference counts. The jury also found against Scussel on an interference claim. See the companion appeal in Scussel v. Balter, _____ So.2d _____ (Fla. 3d DCA 1980) (Case no. 78-997, opinion filed this date). It ruled in favor of co-defendant Robert Frank. See note 2, supra, and Balter v. Frank, _____ So.2d _____ (Fla. 3d DCA 1980) (Case no. 78-1019, opinion filed this date). At the conclusion of the plaintiff's case, the trial judge directed a verdict in favor of Pan American Bank of Hialeah. See note 2, supra. We affirmed that action in Balter v. Pan American Bank of Hialeah, 383 So.2d 256 (Fla. 3d DCA 1980).

a confusing amalgam of the entire decade-old and immensely complex set of relationships between and among all the parties involved. Our analysis of the massive record on appeal has been hampered by this fact; by the failure of the special verdict to specify precisely with which "contract . . . reasonable business expectations" Ethyl was found guilty of interfering; and even more by Balter's understandable inability to articulate a coherent, consistent theory of liability. Nevertheless, we have carefully reviewed the entire transcript in the light of the applicable law. We find no evidence whatever to sustain the verdict against Ethyl on any basis.[6]

To establish the tort of interference with a contractual or business relationship, it is well-settled in Florida that one must allege and prove (1) the existence of a business relationship under which the plaintiff has legal rights, (2) an intentional and unjustified interference with that relationship by the defendant and (3) damage to the plaintiff as a result of the breach of the business relationship. E.g., Nitzberg v. Zalesky, 370 So.2d 389 (Fla. 3d DCA 1979); Symon v. J. Rolfe Davis, Inc., 245 So.2d 278 (Fla. 1st DCA 1971). Turning first to Ethyl's alleged interference with the Balter-Wolf agreement, the existence of the agreement itself may satisfy the first requisite of the tort. There are any number of reasons, however, why the remaining requirements have not been met. First and foremost, the evidence presented at trial conclusively established — and Balter

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[6]The result reached by the jury is probably attributable to a clearly erroneous instruction which virtually directed a verdict in Balter's favor. If we did not conclude that judgment must be entered for Ethyl, the charge in question would have required reversal for a new trial.

has admitted — that Ethyl never attempted to interfere directly with the Balter-Wolf relationship, and did not even communicate with Wolf until after he had already withdrawn his $100,000. Thus, there was a total lack of proof of a direct interference with that agreement, which is indispensible to the existence of an actionable wrong. Balter was able to show, at most, that steps taken by Ethyl very indirectly led to Wolf's withdrawal from the arrangement. Even if those acts were not privileged, as we hold *infra* they were, such conduct simply does not meet the requirements of the *intentional* tort of interference. There is no such thing as a cause of action for interference which is only negligently or consequentially effected. 4 Restatement (Second) of Torts §766 C (1979). See also Hales v. Ashland Oil, Inc., 342 So.2d 984 (Fla. 3d DCA 1977), and cases cited. Furthermore, the only expectations which Balter would even arguably have realized had Wolf not reneged on his agreement were those which flowed solely and directly from Ethyl's own undertaking to return the stock if a plan of arrangement were consummated. Hence, Ethyl was essentially accused of interfering with its own undertaking to Balter.[7] No such action lies under the law of Florida. See United Yacht Brokers, Inc. v. Gillespie, 377 So.2d 668 (Fla. 1979), and cases cited.

Balter also apparently contends that Ethyl may be held liable because of various pre-Chapter XI actions — including selling Pac-Craft allegedly defective film and "causing" City National to call its loan — which he says "forced" the corporation into reorganization. Again,

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[7]Which the jury found was not itself breached.

there are numerous reasons why such claims may not be recognized. Primary among them is the fact that these activities were not directed against Balter or his relationship with Pac-Craft at all, but merely to the corporation itself. While they may or may not have justified an action by Pac-Craft against Ethyl, or a stockholder's derivative action filed by Balter in the name of Pac-Craft, they did not invade Balter's individual rights and therefore cannot form the basis of a tort action by him individually. See, e.g., Alario v. Miller, 354 So.2d 925 (Fla. 2d DCA 1978), and cases cited; Remy Beverages, Inc. v. Myer, 56 N.Y.S. 2d 828 (Sup.Ct. 1945), aff'd, 59 N.Y.S. 2d 371 (App. Div. 1945). In addition, Balter specifically released Ethyl from any such personal claims in return for its release of his $360,000 guarantee on the CNB note Ethyl had satisfied. See Genung v. Loftin, 152 Fla. 759, 13 So.2d 149 (1943); Berry v. Pyrofax Gas Corp., 121 So.2d 447 (Fla. 1st DCA 1960). Finally, a complex and utterly unforeseeable series of events intervened between these actions and Balter's eventual failure to receive the Pac-Craft stock[8] — which would have occurred had Balter only been able to comply with the final reorganization plan which Ethyl had approved and with which it did not interfere. Hence, there was no proximate relationship between the activities in question and Balter's alleged damages. See Doft & Company, Inc. v. Home Federal Savings & Loan Ass'n., 592 F.2d 1361 (5th Cir. 1979); Cone v. Inter County Telephone & Telegraph Co., 40 So.2d 148 (Fla. 1949); Seaway Yacht Sales, Inc. v. Brunswick Corp., 242 So.2d 192 (Fla. 3d DCA 1970).

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[8]See note 2, supra, and accompanying text.

Insofar as the plaintiff separately claims the right to recovery for Ethyl's "interference" with expectations arising from the Balter-CNB-Ethyl loan agreement or the Balter-Ethyl "reorganization" contracts, his contentions also founder upon the principle, to which we have already referred, that a cause of action for interference does not exist against one who is himself a party to the contract allegedly interfered with. E.g., United Yacht Brokers, Inc. v. Gillespie, supra; Paradise Shores Apts., Inc. v. Practical Maintenance Co., 344 So.2d 299 (Fla. 2d DCA 1977); Roberts Co., Inc. v. P.B.O. Ltd., 322 So.2d 633 (Fla. 3d DCA 1975); Days v. Florida East Coast R. Co., 165 So.2d 434 (Fla. 3d DCA 1964); see Berenson v. World Jai-Alai, Inc., 374 So.2d 35 (Fla. 3d DCA 1979).

There is, moreover, a completely separate, additional, and overriding reason which precludes Ethyl's liability for "interference" with any of the various contracts and relationships cited by Balter. Ethyl was, as a matter of law, privileged to act as it did throughout the entire course of events involved in this case. At all times, its actions were reasonably directed to the recovery of the very substantial sums it was owed by Pac-Craft, to the protection of its status as the co-obligor with the corporation on a $450,000 loan it was later required to pay, and, finally, as the lawful holder of 100% of its stock. Nitzberg v. Zalesky, supra, and Babson Bros. Co. v. Allison, 337 So.2d 848 (Fla. 1st DCA 1976), cert. denied, 348 So.2d 944 (Fla. 1977), among many other authorities, establish the principle that, so long as improper means are not employed,[9] activities taken to

[9]The record contains no evidence of any such improper or unlawful activity by Ethyl. Compare cases cited, W. Prosser, Law of Torts §129 at 936-937, nn. 30-35 (4th ed. 1971).

safeguard or promote one's own financial, and contractual interests are entirely non-actionable. See also, e.g., Coronet Development Co. v. F.S.W., Inc., 379 Mich. 302, 150 N.W.2d 809 (1967); Petit v. Cuneo, 290 Ill.App. 16, 7 N.E.2d 774 (1937); accord, 4 Restatement (Second) of Torts, §769, comment c (1979); cf. Matter of Kearney Chemicals, Inc., 468 F.Supp. 1107 (D. Del. 1979).

It is also clear, contrary to Balter's position here, that it is irrelevant whether the person who takes authorized steps to protect his own interests does so while also harboring some personal malice or ill-will towards the plaintiff — that is, in this context, that Ethyl's employees, while attempting to protect its economic situation, also may have happened to dislike Balter personally.[10] In Chipley v. Atkinson, 23 Fla. 206, 1 So. 934, 938 (1887) the first Florida decision to recognize the tort of interference, our supreme court squarely so stated:

> "Where one does an act which is legal in itself, and violates no right of another person, it is true that the fact that the act is done from malice, or other bad motive towards another, does not give the latter a right of action against the former."

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[10]We assume without deciding the correctness of Balter's very dubious position that there was some evidence of such motivation in Ethyl's conduct. It should be noted, however, that the existence of any such "malice" is completely belied by Ethyl's continued willingness, even eagerness, for Balter to continue as the head and owner of Pac-Craft, even when it enjoyed repeated opportunities either to bankrupt the company outright or to take it over itself and thus to freeze him out entirely.

As the court held in the leading case of Beardsley v. Kilmer, 236 N.Y. 80, 140 N.E. 203, 205-206 (1923):

> [W]e have a case where the plaintiff is complaining of and seeking redress for injuries caused by an act which is the product of mixed motives some of which are perfectly legitimate. The question is whether his cause of action can successfully rest upon such a foundation. We feel sure it cannot.
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> * * *
>
> [I]n other jurisdictions in this country and in England the courts in response to a broader and more equitable vision of the interrelated rights of individuals have tended toward the denial of this proposition that it is lawful to perform an otherwise legal act injuring another *when there is no excuse for its performance except the malicious purpose of injury.* [citing numerous cases]
>
> But as we have pointed out we are compelled to disagree with plaintiff's view that the acts complained of were solely the conception and birth of malicious motives, and when we do this and decide that *there were also legitimate purposes the rule seems to be perfectly well established that there is no liability.* The question how far one individual shall be restrained from doing acts which are inherently proper out of respect for the rights of others is bound to be a delicate one. The proposition that a man may not dig a well upon his own land or enter

> upon a lawful business is one to be advanced with considerable caution, and the cases seem firmly to establish the rule that if he digs a well because he really wants the water or starts the business for personal advantage or gain his neighbor is without remedy however much he suffers, and *even though the act may also have been tinged with animosity and malice.* [e.s.]

There seems to be no authority which holds to the contrary of this proposition. Accord, e.g., Arnold v. Moffit, 30 R.I. 310, 75 A. 502 (1910); Raycroft v. Tayntor, 68 Vt. 219, 35 A. 53 (1896); cases collected, W. Prosser, Law of Torts §129 at 943, nn. 93-94 (4th ed. 1971); 30 Am.Jur. Interference §§33,51 (1958); 45 Am.Jur.2d Interference §23 (1969); Annot., 26 A.L.R.2d 1227, 1259, §23 (1952). See generally DeMarco v. Publix Supermarkets, Inc., ___ So.2d ___ (Fla. 1980), affirming and adopting, 360 So.2d 134 (Fla. 3d DCA 1978); Catania v. Eastern Airlines, Inc.,.381 So.2d 265, 267 (Fla. 3d DCA 1980).

In support of his contrary position on this issue, Balter relies solely upon an isolated phrase which appears in Nitzberg v. Zalesky, supra, at 370 So.2d 391, and Serafino v. Palm Terrace Apartments, Inc., 343 So.2d 851, 852 (Fla. 2d DCA 1976), to the effect "that a contracting party has a justification or privilege to interfere where necessary to protect that party's own contractual rights *provided such interference is without malice.*" [e.s.] Insofar as the emphasized clause, which is clearly dictum in both cases, may imply that otherwise privileged activity becomes tortious simply if it is accompanied by a malicious disposition, we believe, for

the reasons stated, that it is not a correct statement of the law. Hence, to the extent, we recede from that expression in *Nitzberg*, and disapprove the one in *Serafino*.

In support of this determination, we note that the out-of-state cases and text authority cited in *Serafino* — which was in turn, the sole basis for the statement in *Nitzberg* — deal only with quite different issues from those arising from the economically privileged actions which are involved in this case, as well as in *Nitzberg* and in *Serafino* itself. The only Florida case cited on the question in *Serafino*, Hunter Lyon, Inc. v. Walker, 152 Fla. 61, 11 So.2d 176, 177 (1942) actually *holds* that "[t]he ultimate issue will be whether the interference charged was done *solely* through malice or in the lawful protection of defendant's loans." [e.s.]. We similarly find in this case that, since it is beyond question that Ethyl acted in the lawful protection of its legitimate interests in receiving the money it was owed and not "solely" out of malice, the personal feelings its employees may have had about Balter make no difference at all.

The record demonstrates that Balter lost his interest in Pac-Craft and that Ethyl had taken various actions over the years which had something to do with that eventual result — but it shows nothing else. There is utterly no evidence that Ethyl committed any actionable wrong, that it engaged in any activity which is or should be recognized by the law of torts as giving rise to an action by Balter to recover damages on his behalf.

We therefore reverse the judgment against Ethyl and remand the cause with directions that judgment be entered in its favor.

Reversed and remanded.

IN THE THIRD DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 78-994

ETHYL CORPORATION,
Appellant/Cross Appellee,

vs.

DAVID BALTER,
Appellee/Cross Appellant.

MOTION FOR REHEARING

Appellee/Cross Appellant, David Balter, respectfully moves this Honorable Court to rehear and reconsider its opinion and decision of July 8, 1980.

SUMMARY OF POINTS MISAPPREHENDED OR OVERLOOKED

1. The Court's opinion re-evaluates the facts and the inferences to be derived from those facts, resolves all factual disputes in favor of Appellant Ethyl, and omits all facts unfavorable to Appellant Ethyl. It thereby violates fundamental principles of appellate review. And it denies Appellee his *constitutional right to trial by jury.*

2. The Court's opinion incorrectly requires that interference be "direct," as well as "intentional and

unjustified." It thereby adds an entirely new element to the tort, contrary to Florida law, and rejects *Franklin v Brown* (Fla 1st DCA 1969) which has been repeatedly followed by this and other courts of appeal.

3. The Court's opinion confuses Florida law of causation and damages, and subsitutes the Court's factual assessments for the jury's on these key issues.

4. The Court's opinion on the issue of an actor's incidental personal malice quotes a 1923 New York decision which not only is contrary to Florida law but does not apply to tortious interference even in the state of New York. That decision deals with a cause of action ("prima facie tort") not recognized in Florida and not involved here.

5. The Court's opinion misapprehends the nature of the *means* used by Ethyl to interfere with Balter's relationship with Pac Craft, overlooks Ethyl's use of actual deceit, its disregard of direct court orders, and its fraud on other creditors. By overlooking these egregious activities, the opinion substitutes the Court's own subjective opinion of what constitutes *proper means* for the jury's. Florida law, conceded by Ethyl, requires the issue to be decided by the *jury*, not by appeals courts.

The Review Procedure Followed in the Court's Opinion Violates Fundamental Principles of Appellate Review and Unconstitutionally Deprives Appellee of his Florida and Federal Rights to Jury Trial.

An appellate court cannot substitute its judgment for that of the jury on questions of fact.[1] But this Court's opinion re-evaluates the facts and the inferences properly derived from those facts, resolves all factual disputes in Appellant Ethyl's favor, and gives Ethyl the benefit of every doubt on the inferences to be derived from those facts. A re-evaluation of that sort contradicts every principle of appellate review. It clearly denies David Balter's rights, under Article I, §22 of the Florida Constitution and the Seventh Amendment to the Constitution of the United States, to trial by jury. Both guaranties apply to Florida citizens. *Hollywood, Inc. v City of Hollywood*, 321 So2d 65, 71 (Fla 1975). The Seventh Amendment clearly and unequivocally states that *"no fact tried by a jury shall be otherwise re-examined in any Court . . . ."*

The Court's opinion rejects some facts and accepts others, and overlooks and misapprehends the entire pattern of conduct displayed by the evidence presented to the jury, distorting and separating the facts in Ethyl's favor. The following are but a few instances, evident from the face of the opinion, of the Court's substitution

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[1]See e.g., Levenstein v Sapiro, 279 So2d 858 (Fla 1973); Helman v Seaboard Coast Line R. Co., 349 So2d 1187 (Fla 1977); Midstate Hauling Co. v Fowler, 176 So2d 87 (Fla 1965); Exchange Bank of St. Augustine v Fla. Nat'l. Bank of Jacksonville, 229 So2d 361 (Fla 1974); Bermil Corp. v Sawyer, 353 So2d 579, 583 (Fla 3d DCA 1978); Lee v Dade County, 342 So2d 846, 847 (Fla 3d DCA 1977).

of its own factual assessments for those facts properly decided in Appellee's favor by the jury:

a. The Court's opinion states that:

> During the late 1960's, Pac-Craft encountered severe financial difficulties which primarily included its inability to pay its outstanding account with Ethyl, by far its largest creditor. As a result, Pac-Craft negotiated a $450,000 loan from the City National Bank of Miami (CNB), which was personally guaranteed both by Balter and Stanley Fromm, the owner of the other half of Pac-Craft, and which was secured by their stock in the company. The only reason the bank agreed to the loan was that Ethyl guaranteed it. Ethyl had decided, rather than forcing Pac-Craft into bankruptcy, instead to attempt to preserve the existence of an important customer in the hopes of receiving a greater return on its outstanding balance and of securing future business as well. In March of 1969, however, Pac-Craft defaulted on the loan. In accordance with the guarantee agreement, the CNB debt was satisfied by Ethyl which was assigned both the pledged Pac-Craft stock and the personal guarantees of Balter and Fromm.

The evidence believed by the jury shows that:

(1) The severe financial difficulties encountered by Pac Craft in the late 1960's directly resulted from Ethyl's supplying of defective polyethylene

film to Pac Craft and its refusal, despite its promises to do so, to give Pac Craft the proper credits for defective film. (T 3771-3, 3811-8, 4024-5)

(2) In May of 1967, when the CNB loan transaction occurred, Pac Craft was not anywhere near bankruptcy; in fact it was contemplating future expansion. (T 3802-9) The Court has confused the situation which existed in 1967 with the situation in late 1968 and early 1969.

(3) The CNB loan was Ethyl's idea. It was meant to finance the expansion into the bakery market which Ethyl wanted Pac Craft to undertake. (T 3770-5, 3802) The money was used to pay off the existing trade debt to Ethyl so Pac Craft would have the resources to expand.

(3) About six months before the CNB transaction, Ethyl was already contemplating the forced acquisition of Pac Craft. (P Exh 69) The jury correctly determined that the conditions Ethyl attached to the CNB financing were meant to put Ethyl in a position to destroy Balter's control of Pac Craft at any time.

(4) Throughout 1968, Ethyl improperly abused its economic strength by denying Pac Craft the credits it had promised for defective film. (T 3817-8, 3827, 4025; P Exh 64) The purpose of this denial, the jury correctly found, was to oust Balter as a stockholder and manager of Pac Craft. (P Exh 64, 56, 59)

(5) Ethyl's acts caused Pac Craft's default on the CNB loan, (T 3822-3, 3826-9) The action taken on that default was arranged between Ethyl and CNB. (P Exh 55)

In sum, in the very first paragraph of its opinion, this Court has overlooked or misapprehended the entire sequence of events, and the causes and motivations behind the events, leading up to March, 1969.

b. The Court's opinion states that:

> At all times, Ethyl's actions were reasonably directed to the recovery of the very substantial sums it was owed by Pac-Craft, to the protection of its status as the co-obligor with the corporation on a $450,000 loan it was later required to pay, and, finally, as the lawful holder of 100% of its stock.

The jury found that Ethyl did not act to protect its interest in Pac Craft (which might or might not give Ethyl a privilege), but to acquire or control Pac Craft in derogation of Balter's rights.

That finding was supported by:

(1) The Ethyl memoranda introduced into evidence at trial, which show a continued intent *to increase Ethyl's interest* in the company (either through a direct take-over, a substitution of a manager loyal to Ethyl, or a liquidation), *not* to preserve

and protect an existing interest (P Exh 69, 64, 56, 59, 58);[2]

(2) Evidence showing that Ethyl scuttled a Chapter XI plan of arrangement which would have returned 50% of its inflated "debt" (as opposed to 25% or 30%) for reasons not worthy of serious consideration (a proposal to pay about $1200 to small creditors). (T 917-8)

Ethyl was determined to exercise control of Pac Craft, either by acquiring it outright or by putting someone it could control in charge. (P Exh 69, 64, 56, 59, 58) The jury correctly found that this was not necessary or reasonably directed to the protection of Ethyl's interest in Pac Craft. The Court's opinion improperly substitutes a finding to the contrary, overlooking or misapprehending the facts and the law.

c. The Court's opinion states that:

> Balter, however, was unable to produce an additional $34,000 which was necessary to fund the plan which had been finally approved by the Chapter XI bankruptcy court and by Ethyl and the Pac-Craft creditors' committee which Ethyl dominated as the control creditor.

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[2]The distinction is critical: even assuming proper means, the latter may be privileged; the former is not. See Babson Bros. Co. v Allison, 337 So2d 848 (Fla 1st DCA 1976).

* * *

> Initial plans of reorganization submitted by Balter, . . . would have required no or substantially less monies to fund, but . . . would also have brought Ethyl far less return on its outstanding claim.

Because Ethyl's improper maneuverings had forced up the amount of cash required to fund Balter's plans, *not* by $34,000 as indicated in the Court's opinion, but by almost $100,000 (from $150,000 to $247,000) (T 3940; 4009-19), *Balter foreseeably could not fund the plan.* The evidence supported the jury finding that Ethyl told Balter it would accept his first plan of arrangement, which provided a fifty percent (50%) return to the creditors on their debt, payable over a four-year period. (T 3868-9, 3897, 3899- 3900, 3915, 3918-9) It then destroyed that plan in Bankruptcy Court, and forced Balter to submit a plan which gave the creditors a higher cash-up-front return, but which paid them *only* twenty- five percent (25%) of their debt. (1033-4) Ethyl then scuttled that plan by bringing a competitor into Pac Craft's files to obtain data to submit a higher proposal (in violation of Bankruptcy Court order). (T 3933, 1044-5, 1893-1905) This foreseeably and predictably forced Balter to submit a plan which provided the creditors with a thirty-five percent (35%) return (still less than Balter's originally proposed 50%). *It is absolutely incorrect* to say that Balter's initial plan would have brought Ethyl a far lower return on its outstanding claims against Pac Craft.

d. The Court's opinion states that:

Ethyl thus lost more than $300,000 out-of-pocket in its dealings with Balter and Pac-Craft.

In fact:

(1) Ethyl owed Pac Craft at least $150,000 (according to Balter, $200,000) in credits for defective film in 1968, and paid only $50,000. (T 1018) Prior to that in 1967, it had been paid for defective film with funds from the CNB loan. (T 4024-5)

(2) The $150,000 did not include the large cost of reprocessing and reshipping the bags made from Ethyl's defective film to Pac Craft's customers, for which Ethyl undoubtedly would have been liable. (T 3823, 3226)

(3) Ethyl received $185,000 in the Chapter XI proceeding (35% of total $500,000 "debt").

Although it may be unclear how much, if anything, Ethyl lost, it is very clear it was nowhere near $300,000. And by forcing Balter not to include the $100,000 to $200,000 set-off in Pac Craft's schedule of assets, Ethyl defrauded other Pac Craft creditors — and the Bankruptcy Court — by getting a percentage of a much higher and falsified "debt" claim. This is hardly in the category of activities privileged as a matter of law.

e. The Court's opinion states that Ethyl committed no wrongful acts on its road to the destruction of Balter's

relationship with Pac Craft and Wolf. This completely overlooks the following facts:

(1) It was not necessary for Balter to put Pac Craft in Bankruptcy Court. Ethyl induced him to do so by promising him 100% of Pac Craft's stock and the opportunity to present a plan of arrangement which it promised not to oppose. (T 4041-7; P Exh 20) Ethyl had no intention of keeping any of these promises.

(2) Ethyl solicited Smart Pac's offer by deceiving Smart Pac as to the nature of Ethyl's relationship with Balter, the financial condition of Pac Craft, and the meaning of the Chapter XI proceeding; in order to aid and assist Smart Pac's presentation of its offer, Ethyl violated an express directive of the Bankruptcy Court. (T 1884-5 1911, 1044-5, 1893-1905) The jury correctly found these to be improper means to protect one's interest. *Insurance Field Services v White & White Inspection*, 384 So2d 303 (Fla 5th DCA June 11, 1980). The *White & White* decision was handed down after the oral argument in this case. It directly conflicts with this Court's opinion on this point. Affirming the rulings of present Supreme Court Justice Parker Lee McDonald, the Fifth District held:

> The question of whether appellants' admittedly intentional interference was unjustifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all

circumstances among which the methods and means used and the relation of the parties are important. Restatement 2d, Torts §767 and comments.

In framing the issue, we agree with the opinion of the New Jersey Supreme Court in Grillo v Board of Realtors of the Plainfield Area, 91 N.J.Super. 202, 219 A.2d 635 (1966), that the ultimate inquiry is whether the interference by the defendant is "sanctioned by the rules of the game." As the New Jersey Court notes:

> There can be no tighter test of liability in this area than that of the common conception of what is right and just dealing under the circumstances. *Not only must defendants' motive and purpose be proper but so also must be the means.*

(3) As previously discussed, Ethyl always acted for the purpose of ousting Balter from Pac Craft so that it could substitute itself *or someone it controlled* in his place. These acts were directed against Balter and against his relationship with Pac Craft, and not against the corporation itself. The memoranda never once speak of injuring Pac Craft, but show a total and complete disregard of Balter's rights.

(4) Balter did not release Ethyl from any of his personal claims in return for Ethyl's release of his $360,000 guarantee on the City National Bank note. To begin with, the evidence would support a jury finding that releases were never exchanged,

based upon the testimony and upon the terms of the Balter/Ethyl agreement, which provided for exchange of releases at the completion of Balter's plan (and that never occurred). (P Exh 14) In addition, the jury (properly instructed) properly found that if any releases were in fact ever exchanged, they were not intended to affect Balter's claims here.

(5) Although Balter has not asserted a separate claim for Ethyl's interference with his expectations arising from the CNB loan agreement, Ethyl's actions in connection with the CNB loan agreement were part and parcel of its ongoing plan to interfere with Balter's relationship with Pac Craft.

(3) Balter surrendered a separate claim for damages based on breach of warranty for defective film at trial. The defective film appears here only because Ethyl manipulated the "credits" situation to oust Balter from his position with Pac Craft.

The Court's opinion overlooks or misapprehends the elements of the tort of tortious interference.

The law of Florida requires that interference be "intentional and unjustified", *not "direct,"* as stated in the Court's opinion. Ethyl's interference with Balter's contractual relationship with Wolf was undoubtedly intentional. It intentionally raised the amount of money needed by Balter to fund a plan, knowing that Balter had made arrangements with a third party (not Wolf) to fund the plan. (T 3868-9, 3897, 3899-3900, 3915, 3918-9) Under no fair reading of these facts could this interference be described as "negligent", nor did Balter ever make a claim for negligent interference. The Court's

requirement that Ethyl communicate with Wolf in order for Balter to recover overlooks or misapprehends the decision in *Franklin v Brown*, 159 So2d 893 (Fla 1st DCA 1964), cited with approval by this Court in *John B. Reid & Assoc., Inc. v Jimenez*, 181 So2d 575 (Fla 3d DCA 1966), *Mead Corp v Mason*, 191 So2d 592 (Fla 3d DCA 1966); *Retzky v J.A. Cantor Assoc., Inc.*, 192 So2d 24 (Fla 3d DCA 1966); and *Calvary Church, Inc. v Siegel*, 358 So2d 1134, 1136 (Fla 3d DCA 1978). See also *Doft & Company, Inc. v Home Federal Savings and Loan*, 592 F2d 1361 (5th Cir 1979, Fla). Compare the *White & White* decision.

These decisions hold that a party who intentionally destroys the subject matter of a contract is liable for tortious interference to the same extent as one who unlawfully induces a breach. This Court's opinion totally overlooks this law, or totally changes it by its decision here. Ethyl's acts undoubtedly destroyed the subject matter of Balter's contract with Wolf: the financing of Balter's plan of arrangement and the corporation itself.

Ethyl's destruction of the subject matter of the Balter/Wolf contract is undoubtedly illegal under all prior Florida law. The current decision creates massive confusion as to whether there remains any tort of interference in Florida's Third District. And as a matter of policy, the Court's decision reverts to the unbridled economic power, might-makes-right, era of a century ago.

The Court's opinion overlooks or misapprehends the facts by stating that Balter had no standing to sue Ethyl under the CNB loan agreement.

The facts show that Balter was, individually, a party to that contract and that *his guaranty* and *his stock* were on the line with CNB. Even had Balter's position vis-a-vis CNB been unenforceable, the law presumes CNB would not have called the loan without Ethyl's interference. See *Azar v Lehigh Corp.*, 369 So2d 860 (Fla 2d DCA 1978); *Franklin v Brown; John B. Reid v Jimenez;* and *White & White.*

The Court's assumption that Balter's only rights were "derivative" is therefore demonstrably incorrect. *Alario v Miller,* 354 So2d 925 (Fla 2 DCA 1978), cited in the opinion, contrary to its citation, recognizes that individual stockholders may have separate, non-derivative rights. See page 926, right column.

Ethyl is not being accused of "interfering with its own contract" with Balter

Ethyl was indeed not a party to the Balter/Wolf contract. And it is *not* being accused of "interfering with its own undertaking" to Balter. The Court's opinion confuses the elements of the tort of interference in stating that Balter's claim for interference with his contract with Wolf is really a claim for Ethyl's interference with its own contract with Balter. The first element of the tort, a contract with a third party, is undoubtedly satisfied by the contract between Balter and Wolf. The fact that damage caused by interference with a third party contract happens to include loss of benefits under

another contract with the interferor does *not* transmute the claim into a suit for interference with the interferor's own contract.

The Court's opinion overlooks or misapprehends the many cases stating that the existence of legal causation is a question to be decided by the jury, and not as a matter of law by the trial court, and certainly never by an appellate court.

The Court's opinion overlooks or misapprehends the many cases stating that the existence of legal causation is a question to be decided by the jury, and not as a matter of law by the trial court, and certainly never by an appellate court overruling both. This principle was re-emphasized by the Supreme Court while this case was under consideration. *Gibson v Avis Rent-A-Car System*, 1980 FLW 248 (Fla May 16, 1980). See also *Helman v S.C.L.R.R. Co.*, 349 So2d 1187 (Fla 1977); *Ranger v Avis Rent-A-Car System, Inc.*, 336 So2d 467 (Fla 3d DCA 1976); *Vertommen V Williams*, 287 So2d 116 (Fla 4th DCA 1974); *Railway Express Agency, Inc. v Garland*, 269 So2d 708 (Fla 1st DCA 1972); *DamBakly v Mason*, 184 So2d 35 (Fla 3d DCA 1967); *Savarese v Holl*, 128 So2d 775 (Fla 3d DCA 1961). The Court's opinion asserts that "Ethyl could not have foreseen" that Balter would be unable to raise the amounts of cash-up-front necessary to fund the new plans Ethyl's improper acts forced Balter to submit. The jury has found to the contrary on this question of fact. Indeed, *the jury properly found that Ethyl not only foresaw but actually intended this result!* The Court's opinion overlooks or misapprehends both the jury's finding and the case law prohibiting this Court's "re-examination"

of that finding. Only a jury could properly begin even to consider disbelieving the internal memoranda discovered in Ethyl's files (excerpted in the Appendix on the pages annexed from Appellee's brief). No review, however jaundiced or cynical, can properly and constitutionally dismiss those memoranda as "utterly no evidence" of improper means or tortious intent.

In additon, the opinion's citation of a negligence decision to support the statement that there was "no proximate relationship between Ethyl's activities and Balter's damages overlooks or misapprehends well established law to the effect that *causation is measured by far less stringent standards when the tort complained of is an intentional one as opposed to negligent.* See *Briggs v Brown*, 46 So 325 (Fla 1908); *Johnson v Greer*, 447 F2d 101, 106-7 (5th Cir 1973). See also, *Concord Florida, Inc. v Lewin*, 341 So2d 242, 245 (Fla 3d DCA 1977) (Hendry J.).

The cases cited in this Court's opinion on the issue of "personal animosity" do not represent Florida law.

The cases cited in this Court's opinion about personal animosity do not state Florida law. Even in the states noted, they don't — by definition — apply to tortious interference cases. *Beardsley v Kilmer*, 140 NE 203, 205-6 (1923), and the other out of state cases cited by the Court, deal with the concept of "prima facie tort". No case in Florida has ever adopted this concept. Prima facie tort, a New York cause of action, gives a plaintiff the right to sue a defendant for the defendant's lawful actions where such actions are undertaken for a purely

malicious purpose. *Steward v Worldwide Automobiles Corp.*, 189 NYS2d 540 (1959); *Sheppard v Cooper's, Inc.*, 156 NYS2d 391 (1956); *Ruza v Ruza*, 146 NYS2d 808, 811 (1955); and *Kajtazi v Kajtazi*, 488 FSupp 15, 21 (EDNY 1978). If the acts of which he complains constitute separate, recognized torts (such as tortious interference) no one may sue for a "prima facie tort". *Best Window Co. vs Better Business Bureau*, 146 NYS2d 383, 385 (1955); *Kaplan v K. Ginsburg, Inc.*, 178 NYS2d 25, 30 (1958). The Court's opinion therefore overlooks or misapprehends the total and complete inapplicability of this bizarre New York, minority concept to Florida (or New York) litigants in interference cases.

Balter claimed, the jury found, and the evidence showed that Ethyl had embarked on a course of conduct intentionally calculated to interfere with and destroy Balter's relationship with Pac Craft. This plan included Ethyl's lying to Balter about its intentions, disobeying a Bankruptcy Court directive, lying even to Smart Pac to induce it to submit a competing plan, misleading other creditors as to the amounts owed to Ethyl by Pac Craft and manipulating credits known to be due for defective film. It meets every element of tortious interference. The jury correctly judged these acts improper and illegal. *Cf. White & White.* Balter did not claim, as apparently this Court mistakenly believes, that Ethyl had engaged in a perfectly proper course of conduct made actionable only because the motives for it were tinged with personal animosity toward him. He did not sue or recover for "prima facie tort."

The Florida cases cited in connection with this issue, *DeMarco v Public Supermarket, Inc.*, _____ So2d _____ (Fla 1980) and *Catalina v Eastern Airlines, Inc.*,

381 So2d 265, 267 (Fla 3d DCA 1980) are not about intentional interference. They deal with the subject of wrongful discharge by an employer of an employee. This Court's opinion overlooks or misapprehends the fact that those cases are completely inapposite here.

The Court's opinion overlooks or misapprehends the law and the facts in its decision on Balter's cross-appeals for breach of contract and fraud.

The very evidence recited by the Court's opinion (Ethyl's inducement of Smart Pac's "bidding", which Ethyl's representative lied about at trial) *constitutes an undeniable and unmistakable violation of Florida law of contract:* no one may deliberately and in bad faith prevent another from performing under his contract and reaping its benefits. *Gulf American Land Corp. v Wain*, 166 So2d 763 (Fla 3d DCA 1964). The evidence compels the conclusion that Ethyl never intended to honor its contract with Balter. The trial court's refusal to instruct the jury on the issue of fraud deprived Balter of his right to a fair trial. *A.C.L.R. Co. v Shouse*, 91 So 90, 102 (Fla 1922); *Luster v Moore*, 78 So2d 87 (Fla 1955); and *Menard v O'Malley*, 327 So2d 905, 907 (Fla 3d DCA 1976). Yet the Court's opinion deals with these, and the remainder of the cross appeal, merely by four words added as an afterthought in footnote 4. If the jury findings in favor of Balter are to be disregarded, there is no basis for regarding those against him as sacrosanct — especially where they resulted from defective (or no) jury instructions.

The Court has overlooked that proper means are for the jury.

The Court's opinion ignores the expressly-agreed-upon principle that whether actions are "proper means" is for the jury to decide. See Ethyl's reply brief, page 11. And see, *e.g., Frank Coulson Buick, Inc. v Trumbull*, 328 So2d 271 (Fla 4th DCA 1976). See also *Churruca v Miami Jai Alai, Inc.*, 353 So2d 547 (Fla 1978). And see title page to Appendix to this motion.

The Court has overlooked or misapprehended Florida's law on jury instructions.

The Court's opinion (in footnote 4) concerning the jury instruction contravenes the massive Florida case law requiring jury charges to be read in their totality, *prohibiting* continued repetition of elements, and requiring that the closing arguments be considered in assessing whether even an improper charge is harmful. On oral argument, Ethyl's counsel admitted to this Court that, even assuming his (incorrect) reading of the charge, it was never mentioned by anyone on closing argument. His reading of it ignores the four prior repetitions of Ethyl's (unpleaded) "privilege to interfere." And despite Ethyl's assertion's on appeal that its counsel objected "strenuously," the transcript shows but one cryptic (and incorrect) statement that something "amounts to a directed verdict." No one — not the jury, not the trial judge, not plaintiff's counsel — was aware that a verdict had been directed. And the issue was rendered harmless, and moot, by the jury's proper finding of actual malice. Until the Court's July 8, 1980 opinion, no one had ever been "privileged" to engage in malicious acts.

CONCLUSION

For all, or any, of the reasons set forth above, the judgment on the jury verdict should be reinstated and affirmed.

Respectfully submitted,

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By /s/
Guy B. Bailey, Jr.

By /s/
Sara Soto

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1980

THURSDAY, SEPTEMBER 4, 1980

ETHYL CORPORATION,

Appellant,

vs.

DAVID BALTER,

Appellee.

CASE NO. 78-994

Counsel for appellee having filed in this cause motion for rehearing, and same having been considered by the court which determined the cause, it is ordered that said motion be and it is hereby denied.

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

DAVID BALTER,
Plaintiff/Petitioner,

vs.

ETHYL CORPORATION,
Defendants/Respondents.

CASE NO: 78-994

NOTICE OF PETITION FOR CERTIORARI JURISDICTION

Notice is hereby given that David Balter, Plaintiff/Petitioner, invokes the certiorari jurisdiction of the Supreme Court to review the decisions of this Court rendered July 8, 1980, rehearing denied September 4, 1980.

The decisions expressly and directly conflict with previous decisions of the Supreme Court and of other Districts Courts of Appeal.

Respectfully submitted,

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By: /s/_____
Sara Soto

IN THE SUPREME COURT OF FLORIDA

CASES NOS. 59,794
59,795
59,796

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION and
ROBERT FRANK,

Respondents.

PETITIONER'S BRIEF ON JURISDICTION

INTRODUCTION

The decision below[1] expressly holds that one may tortiously interfere with a contract (or reasonable business expectancy) *with actual malice*, so long as the interference serves any economic interest of the malefactor. The Third District's decision holds that interference motivated

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[1]Ethyl Corp. v. Balter, 386 So.2d 1220 (Fla. 3d DCA 1980). This Court consolidated Balter's petition from this decision (No. 59,794) with the petitions from Balter v. Ethyl Corp., 386 So.2d 1226 (Fla. 3d DCA 1980) (No. 59,795) and Balter v. Frank, 386 So.2d 1227 (Fla. 3d DCA 1980) (No. 59,796). All three arose from the same case and trial.

by any self-interest is *absolutely* privileged — that interference is tortious only if "done *solely* through malice."

This holding expressly and directly conflicts with *Serafino v. Palm Terrace Apartments, Inc.*, 343 So.2d 851, 852 (Fla. 2d DCA 1976) (interference to protect one's interest is privileged only if it is "without malice"). The court below, referring to *Serafino*, itself acknowledged the conflict:

> [W]e believe, for the reasons stated, that it is not a correct statement of the law. Hence, to that extent, we recede from that expression in *Nitzberg*,[2] and *disapprove the one in Serafino*.

This Court therefore has jurisdiction.[3]

The conflict is squarely presented: in an action for tortious interference with a contract or with a reasonable business expectancy, is a defendant with a financial interest absolutely privileged to interfere even where he acts with actual malice? The Second District in

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[2]Although itself not a basis for jurisdiction, the decision below also conflicts with the Third District's own decisions in Nitzberg v. Zalesky, 370 So.2d 389 (Fla. 3d DCA 1979), and Nizzo v. Amoco Oil Co., 133 So.2d 491 (Fla. 3d DCA 1976).

[3]Fla. Const. art. V, §3(b)(3) (amended April 1, 1980).

Serafino said "No." The Third District, *expressly* rejecting *Serafino*, said "Yes."[4]

The court below has virtually eliminated the tort of interference: anyone with *any* economic interest can engage in any act, however malicious. If a defendant profits (or hopes to profit) from his malfeasance, he is not liable.[5]

This Court should grant the writ, because of the confusing conflict in precedents, the public importance of the issues presented, and the monstrous injustice perpetrated on Petitioner.

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[4]Moreover, the pernicious nature of the ruling has now infected the Fourth District. Wackenhut Corp. v. Maimone, _ So. 2d _ , 1980 F.L.W. 1807 (Fla. 4th DCA, Sept. 24, 1980), expressly follows *Balter*. On the other hand, the Fifth District, in Ins. Field Serv., Inc. v. White & White Inspection and Audit Serv., Inc., 384 So.2d 303 (Fla. 5th DCA 1980), held that the privilege is not absolute. *See* note 18 *infra*. The *White & White* decision was cited on motion for rehearing, but was ignored.

[5]In addition to creating confusion and conflict, the decision below totally misperceives the nature and elements of the tort. *See* note 23 *infra*, discussing the Restatement (Second) Torts.

STATEMENT OF THE CASE

Statement of the Facts[6]

David Balter sued Ethyl Corporation ("Ethyl") for tortiously interfering with his contracts with and reasonable business expectancies in Pac-Craft Corporation (as controlling stockholder and chief executive officer) and with his contract with financier Paul Wolf.

The jury found: (1) that Ethyl interfered with Balter's relationship with Pac-Craft by tortiously divesting him of ownership and control, and (2) that Ethyl interfered with Balter's relationship with Wolf, by destroying the subject matter of the Wolf-Balter agreement to finance a Chapter XI reorganization.[7] The jury returned a verdict against Ethyl for $1,020,450.[8]

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[6]Unless otherwise noted, Balter's statement of the facts is based on the Third District's own summary, with verbatim quotes from the decision set off in italics. The Third District's decision on its face plainly vests this Court with jurisdiction. The Third District's fact summary, however, is not even remotely accurate.

[7]Balter's claims for damages stem ultimately from the loss of his interest in, and employment opportunities with Pac-Craft Corp., a now defunct Dade County concern of which he was once the president, chief operating officer, and owner of 50% of the capital stock.

Concerning Balter's relationships with Wolf, see note 16 *infra*.

[8]The judgment was entered on a jury verdict which, in answer to a special interrogatory, found that Ethyl had maliciously interfered with Balter's advantageous business relations.

Pac-Craft, a Miami processor and printer of polyethylene film, bought virtually all its raw materials from Ethyl, a nationally dominant film manufacturer.[9]

Balter's troubles began with Pac-Craft's growing trade debt to Ethyl.[10] Balter claimed and the jury believed that Ethyl wrongfully inflated this debt by charging Pac-Craft for defective film. Its express, admitted purpose was to leverage itself into a position to wrest control of Pac-Craft from Balter.[11]

Balter had no choice but to acquiesce in Ethyl's control of Pac-Craft. He pledged his Pac-Craft stock to secure a $450,000 bank loan arranged, guaranteed by,

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[9]It obtained the vast majority of its primary raw material, the film itself, from Ethyl, one of the largest manufacturers of that product in the country.

[10]During the late 1960's, Pac-Craft encountered severe financial difficulties primarily including its inability to pay its outstanding account with Ethyl, by far its largest creditor.

[11]The Third District refers to Ethyl's *"selling Pac-Craft allegedly defective film."* The court pointedly did not find there was no evidence of these claims, ruling instead that these claims were insufficient to hold Ethyl liable. The court bootstrapped itself into the conclusion that Ethyl was *"free now to direct the affairs of Pac-Craft as it wished,"* even though it was Ethyl's defective product that forced Pac-Craft into utter dependence on Ethyl.

and paid to Ethyl.[12] Under Ethyl's control, Pac-Craft predictably missed a loan payment. Even then, the bank called the loan only at Ethyl's demand. Ethyl paid the loan it had caused to be called and took the pledged Pac-Craft stock.[13]

Ethyl, with Balter securely under its corporate thumb, then said it would convey the Pac-Craft stock to Balter if he would put Pac-Craft through a reorganization

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[12]As a result, Pac-Craft negotiated a $450,000 loan with the City National Bank of Miami ("CNB"), which was personally guaranteed both by Balter and Stanley Fromm, the owner of the other half of Pac-Craft, and which was secured by their stock in the company. The only reason the bank agreed to the loan was that Ethyl guaranteed it.

[13]In March of 1969, however, Pac-Craft defaulted on the loan. In accordance with the guarantee agreement the CNB debt was satisfied by Ethyl which was assigned both the pledged Pac-Craft stock and the personal guarantees of Balter and Fromm.

For jurisdictional purposes, Balter may be restricted to these "facts"; indeed he needs no more to demonstrate jurisdiction. In truth, however, the jury properly believed Balter's evidence that Ethyl deliberately and tortiously forced Pac-Craft to this point because Ethyl wanted to wrest control of Pac-Craft from Balter, to thrust its monopoly power into film processing. And Ethyl itself coerced the bank to call the loan, to increase Ethyl's leverage.

The Third District acknowledges only that Balter presented (and the jury properly believed) evidence that Ethyl's acts were malicious. The only hint of the actual rancor which comes clearly through the Third District's summary cloak is the statement that Ethyl was *"free now to direct the affairs of Pac-Craft as it wished."* It plainly did so.

under Chapter XI of the Bankruptcy Act.[14] Balter prepared and submitted a plan of arrangement to the bankruptcy court.

Paul Wolf agreed to finance Balter's plan of arrangement. However, Ethyl (controlling the creditors committee by claiming over 75% of the outstanding debt) kept "moving back the goalpost."[15] Ignoring its agreement with Balter, Ethyl solicited a higher offer from a third party, Smart-Pac Corp., to *liquidate* Pac-Craft. That liquidation offer required Balter to come up with an additional $34,000 in cash, which he could not do.[16] Because of Ethyl's actions, the reorganization failed.

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[14]Ethyl entered into an agreement with Balter under which he would receive back all of the Pac-Craft stock and be released from his personal guarantee if he were able to effectuate a reorganization of Pac-Craft under Chapter XI of the Bankruptcy Code.

[15]What the Third District calls one failed plan of arrangement was in fact a series of three, each forced by Ethyl to have a larger initial cash payment to the creditors and each continually thwarted by Ethyl's tortious conduct, culminating in an adjudication when Balter was unable to raise an additional $34,000.

[16]The Third District's opinion does not mention the fact that Ethyl directly violated a bankruptcy court order in the process of soliciting Smart Pac's offer. The Third District described the bankruptcy proceedings as follows:

> In order to comply with this agreement by supplying sufficient funds to achieve a satisfactory Chapter XI plan, Balter entered into a separate plan with a financier named Paul Wolf, who was represented by John Scussel. This agreement called for Wolf to provide $170,000 of

In sum, Ethyl succeeded in wresting control of Pac-Craft from Balter — first by manipulating trade credits, and then, by interfering with Balter's plan of arrangement. Ethyl did so with actual malice.

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[16]Continued:

> partial funding to Pac-Craft in return for making Wolf a director of the company, and granting him the option to purchase 48% of the stock upon Balter's receipt of all of the shares from Ethyl. Balter, however, was unable to produce the additional $34,000 which was necessary to fund the plan which had been finally approved by the Chapter XI Bankruptcy Court and by Ethyl and the Pac-Craft Creditors Committee which Ethyl dominated as the control creditor. Wolf then withdrew $100,000 of the $170,000 he had deposited with the court, dooming Balter's plan to failure . . . .
>
> [Balter] alleged interference with the Balter-Wolf agreement, because of Ethyl's solicitation from others of subsequent and more favorable offers to reorganize. Balter claimed that the submission of such an offer by the Smart-Pac Corp. made it necessary for him to sweeten "his" plan by the additional $34,000 he subsequently was unable to raise. It was thus claimed that Ethyl had thereby become responsible for Wolf's withdrawal of his funds in breach of his contract.

The Third District ignored the anomaly that Ethyl had agreed to convey the stock to Balter if he successfully put through a plan of arrangement, and yet Ethyl had absolute control over the success of any plan Balter submitted and used that control to thwart Balter. The final plan was necessitated by Ethyl's unlawful solicitation of a liquidation offer from competitor Smart-Pac.

ARGUMENT

I

THIS COURT HAS JURISDICTION BASED ON THE EXPRESS AND DIRECT CONFLICT WITH SERAFINO V. PALM TERRACE APARTMENTS

A. The Third District's Decision Conflicts With Serafino v. Palm Terrace Apartments

Notwithstanding the jury's finding of actual malice,[20] the Third District reversed the $1,020,450 judgment, holding that "Ethyl was, as a matter of law, privileged to act as it did." The Third District held the privilege absolute, expressly rejecting *Serafino v. Palm Terrace Apartments, Inc.*, 343 So.2d 851, 852 (Fla. 2d DCA 1976), in which the Second District held:

> The law recognizes that a contracting party has a justification or privilege to interfere where necessary to protect that party's own contractual rights *provided such interference is without malice.*

The Third District asserted:

> Insofar as the emphasized clause, which is clearly dictum in both cases, may imply that otherwise privileged activity becomes tortious

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[20]The finding of actual malice is manifested both in the special interrogatory verdict and in the punitive damages award.

simply because it is accompanied by a malicious disposition, we believe, for the reasons stated, that it is not a correct statement of the law. Hence, to that extent, we recede from that expression in *Nitzberg*, and disapprove of the one in *Serafino*.

Conflict is plainly established.[18]

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[18]The Third District itself, in Nitzberg v. Zalesky, 370 So.2d 389 (Fla. 3d DCA 1979), had previously agreed with *Serafino*, but rejected its own rule. *See also* Nizzo v. Amoco Oil Co., 333 So.2d 491 (Fla. 3d DCA 1976).

Wackenhut Corp. v. Maimone, _____ So.2d _____, 1980 F.L.W. 1807 (4th Fla. DCA Sept. 24, 1980), by quoting and following Ethyl v. Balter, compounds the conflict and creates intradistrict conflict with Frank Coulson, Inc. — Buick v. Trumbull, 328 So.2d 271 (Fla. 4th DCA 1976), *cert. dismissed*, 336 So.2d 604 (Fla. 1976).

See also Ins. Field Serv., Inc. v. White & White Inspection and Audit Serv., Inc., 384 So.2d 303, 306-307 (Fla. 5th DCA 1980) (plaintiff's tortious interference judgment entered by then Circuit Judge Parker Lee MacDonald affirmed despite defendants' privilege to compete):

> The question of whether appellants' admittedly intentional interference was unjustifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances among which the methods and means used and the relation of the parties are important.
>
> * * *
>
> [T]he ultimate inquiry is whether the interference by the defendant is "sanctioned by the rules of the game."

B. Serafino's Correct Expression of the Law is Not Dictum.

The opinion below self-servingly characterizes as dictum *Serafino's* statement that the self-interest privilege applies only "provided such interference is without malice." The Third District's characterization is both plainly wrong and irrelevant to this Court's jurisdictional determination.

On the facts before it, the Second District in *Serafino* held that there was no liability *only because* there was no malice. Serafino accused Palm Terrace Apartments of interfering with Serafino's contract with one Elam. Elam had agreed to assign an apartment lease to Serafino. Palm Terrace was the lessor. The lease agreement between Palm Terrace and Elam required Palm Terrace's written consent to any assignment, with the provision that consent "shall not be unreasonably withheld." 343 So.2d at 852. Palm Terrace refused to approve the assignment. Serafino sued for interference with his contract with Elam.

The Second District stated the issue: Palm Terrace's liability for "intentional interference with contractual

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Continued:

> There can be no tighter test of liability in this area than that of the common conception of what is right and just dealing under the circumstances. Not only must defendants' motive and purpose be proper but so also must be the means.
>
> [citations omitted]

relations when the defendant is acting under a preexisting contract between it and Elam." That court then followed the very rule rejected in the opinion below:

> The law recognizes that a contracting party has the justification or privilege to interfere where necessary to protect the party's own contractual rights *provided such interference is without malice.*

Id. at 852 (emphasis added).

The Second District *held* that *because* Palm Terrace indisputably acted under its own contract with Elam, *the issue was whether Palm Terrace's actions were malicious:*

> For the plaintiffs to have succeeded, it was necessary for them to plead and prove that the defendant, as a third party, acted maliciously. There was no such allegation or proof. . . . No malice toward the plaintiff was established.

Id.

The Second District's expression of the limits on privilege was plainly necessary to determine the appeal.

It is therefore not dictum.[19] The Second District expressly held that the issue was whether the otherwise privileged acts were malicious in fact. Only on finding that there was no malice did that court reverse.

The Third District's express and direct rejection of *Serafino* creates a conflict of precedents, vesting jurisdiction in this Court.

C. Even Were The Language In *Serafino* Dictum, This Court Would Have Jurisdiction.

Even were this Court to accept the Third District's erroneous characterization of the rule in *Serafino* as dictum, the conflict would still vest this Court with jurisdiction.

A long line of cases, beginning no later than *Sunad, Inc. v. City of Sarasota*, 122 So.2d 611 (Fla. 1960), has

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[19]A determination of an issue essential to dispose of an appeal is not dictum. Scott v. Nat'l Airlines, Inc., 150 So.2d 237 (Fla. 1963) (where court held declaratory relief unavailable because of discharged employee's failure to make an election of remedies, court's statement that employee may elect to pursue contractual remedies or to sue for wrongful discharge was not dictum, because it was "essential to the ultimate conclusion. . ."); Therrell v. Reilly, 151 So. 305, 306 (Fla. 1933) ("What was said in that case was not mere obiter dicta, because it was necessary for us to say what we did in order to dispose of the petition for rehearing. . ."). *See also* Parsons v. Fed. Realty Corp., 143 So. 912, 920 (Fla. 1932) ("A ruling in a case fully considered and decided by an appellate court is not dictum merely because it was not necessary, on account of one conclusion reached upon one question, to consider another question. . . ."). *Accord*, Florida Central R.R. Co. v. Schutte, 103 U.S. 118 (1881).

held that a holding in direct conflict with prior dictum establishes conflict jurisdiction.[20] As this Court recognized in *Sunad* and its progeny, a district court's announcement of a rule of law directly contrary to a previous announcement creates ambivalence in determining the controlling rule of law — even if the prior announcement was dictum.

Nothing has changed this rule. Before the 1980 amendment to article V, a cognizable conflict was defined as "a decision of a district court of appeal which announces a rule of law that conflicts with a rule previously announced. . . ." 1 A. England & T. Simon, Florida Appellate Practice Manual, 38 (1979). Plainly, conflict with prior dictum sufficed.

The 1980 amendment did not change this rule. As noted in England, Hunter, & Williams, "An Analysis of the 1980 Jurisdictional Amendment," 54 Fla. Bar J. 406, 410-411 (1980):

> The effect of the change, simply stated, is that all of the court's discretionary jurisdiction is

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[20]State v. Jackson, 281 So.2d 353, 354 (Fla. 1973); Twomey v. Clausohm, 234 So.2d 338, 339, 340 (Fla. 1970); Sheetmetal Workers' Int'l Ass'n v. Florida Heat and Power, Inc., 230 So.2d 154, 155 (Fla. 1970); Saf-T-Clean, Inc. v. MartinMarietta Corp., 197 So.2d 8, 10 (Fla. 1967); Hagan v. Laragione, 205 So.2d 289, 291 (Fla. 1967); Hawkins v. Williams, 200 So.2d 800, 801 (Fla. 1967); Southern Realty and Util. Corp. v. Belmont Mortgage Corp., 186 So.2d 24, 25 (Fla. 1966); Sweet v. Josephson, 173 So.2d 444, 446 (Fla. 1965); Griffin v. Speidel, 179 So.2d 569, 570 (Fla. 1965); State v. Estate of Moore, 153 So. 2d 819, 821 (Fla. 1963); Shell v. State Road Dept., 135 So.2d 857, 858 (Fla. 1962).

> now predicted on written opinions of the district courts on points of law brought for review, rather than on obscure legal issues which were never discussed at the appellate level.

The amendment eliminated jurisdiction based on per curiam affirmances without opinion, per curiam affirmances containing only a citation of authority,[21] opinions which merely state that the appeal presents no merit, conflict based on dissent or concurrence,[22] and so-called "inherent conflicts." *Id.* at 411. *The amendment did not otherwise affect the types of cognizable conflicts:*

> In light of the limited purposes for the 1980 amendment's effect on the court's conflict jurisdiction — that is, the elimination of intradistrict conflict and, through the "expressly" requirement, the necessity of a written opinion as a predicate for further review — it is also clear that *doctrines which had been developed by case law under the prior provision and which were not antithetical to the two changes would carry forward after April 1, 1980.*

Id. at 413 (emphasis added).

Clearly, the confusion created by the Third District's express disapproval of *Serafino* would be no less were *Serafino's* language dictum (which it plainly is not).

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[21] *See* Dodi Pub. Co. v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980).

[22] *See* Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

The conflict here is express and direct, and this Court has jurisdiction.

D. This Court Should Exercise Its Discretion To Grant The Writ.

1. This Court Should Grant The Writ To Correct The Erroneous Precedent.

The Third District's decision creates an absolute privilege to interfere with another's contract or reasonable business expectancies, maliciously and with impunity, so long as the malefactor will profit from his interference. In effect, the Third District has turned on its head the harmless truism, "crime does not pay." According to the Third District, if it pays, it cannot be a crime.

The Third District's decision is contrary to the overwhelming weight of authority,[23] and a foreboding prognosis for non-predatory free enterprise.

To hold that naked self-interest is a *carte blanche* for malicious acts is plainly contrary to contemporary

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[23]The clear weight of authority holds that the privilege is never absolute. As recognized in *White & White*, "defendants' motive and purpose [must] be proper [and] so also must be the means." The question of whether interference is actionable depends on a *balancing* of the parties' respective interests, purposes, motives, and means. Restatement (Second) Torts §767 (1979) (listing the "factors in determining whether interference is improper"). *See* §767, Comments b and d, and §768, Comment g. (motive to injure serves no socially useful purpose and is improper).

Accord, Fury Imports, Inc. v. Shakespeare Co., 554 F.2d 1376, 1383-1385 (5th Cir. 1977) (plaintiff's jury verdict reinstated; despite defendant's financial interest, jury could have found that purpose "was to eliminate a competitor. . . , and not to preserve . . . a source of supply or . . . an investment. If that were the case, Shakespeare would have no valid claim of privilege."); Frank Coulson, Inc. — Buick v. Trumbull, 328 So.2d 271 (Fla. 4th DCA 1976), *cert. dismissed*, 336 So.2d 604 (Fla. 1976) (privilege a jury question); Frank Coulson, Inc. — Buick v. General Motors Corp., 488 F.2d 202, 206 (5th Cir. 1974) (Fla. law) (jury verdict reinstated; no absolute privilege); Matter of Kearney Chemicals, Inc., 468 F.Supp. 1107, 1112-1115 (D.Del. 1979) (Fla. law) ("Florida . . . probably . . . would have resorted to the ad hoc balancing prescribed by §767 . . . ."); Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175, 1 ALR 4th 1144, 1154-1159 (1978), *cert. denied and appeal dismissed*, 442 U.S. 907 (1979) (in action for tortious interference, privilege to pursue one's own business interests is not absolute, citing Harper & James and the Restatement). *See generally* 1 F. Harper & F. James, The Law of Torts §6.12, at 516 (1956); W. Prosser, Handbook of the Law of Torts §129, at 943 n. 91 (4th ed. 1971).

business standards and traditional notions of fair play. See *Azar v. Lehigh Corp.*, 364 So.2d 860, 862 (Fla. 2d DCA 1978):

> In the final analysis, the issue seems to turn upon whether the subject conduct is considered to be "unfair", according to contemporary business standards.[24]

2. The Third District's Decision is Also a Denial of Balter's Constitutional Right to a Jury Trial.

The seventh amendment of the United States Constitution clearly and unequivocally states that "no fact tried by a jury shall be otherwise re-examined in

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[24]*See also* Upledger v. Vilanor, Inc., 369 So.2d 427, 430 (Fla 2d DCA 1979), *cert. denied*, 378 So.2d 350 (Fla. 1979) (in fraud action, requiring plaintiff to make an "independent investigation" vitiated by the "desire to upgrade business morality. . . ."), approved in Besett v. Basnett, _____ So.2d _____, 1980 F.L.W. 511 (Fla., Oct. 23, 1980). *Cf.* North Dade Imported Motors v. Brundage Motors, Inc., 221 So.2d 170, 177-178 (Fla. 1st DCA 1969), *cert. denied*, 226 So.2d 817 (Fla. 1969):

> The evidence here reflects that Brundage cracked the whip of economic power in its dealings with North Dade [Motors] . . . . Apparently, appellate courts have not been judicially endowed with a conscience; if we are so blessed, our conscience has been shocked by the way Brundage has taken its sledge of franchise agreement and driven the wedge of economic power through the corporate body of North Dade [Motors].

See also White & White, note 18, *supra*.

any court. . . ." The Third District's decision on its face re-evaluates the facts and resolves all factual disputes in Ethyl's favor. Such a reevaluation contradicts every principle of appellate review.[25] And, it clearly denies Balter's right to a jury trial.[26]

II

THE THIRD DISTRICT'S DECISION ALSO DIRECTLY AND EXPRESSLY CONFLICTS WITH ESTABLISHED LAW, IN THAT: (A) IT REQUIRES TORTIOUS INTERFERENCE TO BE "DIRECT"; (B) IT ABUSES APPELLATE STANDARDS OF REVIEW BY EXPRESSLY REEVALUATING THE FACTS; AND (C) IT TAKES THE ISSUE OF LEGAL CAUSATION FROM THE JURY

To determine its jurisdiction, this Court need look no further than the direct and express conflict with *Serafino.* However, the Third District's express departure from settled law does not end there.

First, the Third District held that intentional interference required Ethyl's direct inducement of a

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[25]*See* Delgado v. Strong, 360 So.2d 73 (Fla. 1978); Shaw v. Shaw, 334 So.2d 13 (Fla. 1976); Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972).

[26]Both article I, section 22, of the Florida Constitution and the seventh amendment to the Constitution of the United States apply to Florida citizens. Hollywood, Inc. v. City of Hollywood, 321 So.2d 65, 71 (Fla. 1975).

breach of contract.[27] This holding plainly and expressly conflicts with *Franklin v. Brown*, 159 So.2d 893 (Fla. 1st DCA 1964). That case holds that one who intentionally destroys the subject matter of contract is liable for tortious interference to the same extent as one who unlawfully induces its breach.

Secondly, the Third District's decision manifestly and expressly re-evaluates the evidence[28], in direct conflict with *Delgado v. Strong*, 360 So.2d 73 (Fla. 1978); *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976); and *Westerman v. Shell's City Inc.*, 265 So.2d 43 (Fla. 1972). It is apparent on the face of opinion that the court reviewed the record, ignored factual disputes or settled them in Ethyl's favor, and generally acted as a "superjury," all in contravention of established principles of appellate review.[29]

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[27]Ethyl never attempted to interfere directly with the Balter-Wolf relationship, and did not even communicate with Wolf until after he had already withdrawn his $100,000. Thus, there was a total lack of proof of a direct interference with that agreement, which is indispensable to the existence of an actionable wrong.

[28]*See* notes 6-16, *supra*.

[29]The Third District also opined that alternatively, a reversal for a new trial would be required because of "*a* clearly erroneous instruction." This directly conflicts with the established law that jury instructions must be read "as a whole." Life Ins. Co. of N. America v. Aguila, ___ So.2d ___, 1980 F.L.W. 1943 (Fla. 5th DCA, October 16, 1980).

Finally, the Third District expressly took from the jury the question of legal causation[30], in direct conflict with *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So.2d 520 (Fla. 1980) and *Helman v. S.C.L.R.R. Co.*, 349 So.2d 1187 (Fla. 1977). Recognizing that Ethyl had induced Balter to put Pac-Craft through a Chapter XI reorganization, and, through solicitation of Smart-Pac, increased the initial cash payment to the creditors, the Third District nevertheless held that Ethyl could not have foreseen that Balter would be unable to raise the additional monies required by Ethyl's solicitation. This is a question of fact, not law, and had been determined in Balter's favor by the jury. The Third District redetermined it, in conflict with *Gibson & Helman*.

[30]Finally, a complex and utterly unforeseeable series of events intervened between these actions and Balter's eventual failure to receive the Pac-Craft stock – which would have occurred had Balter only been able to comply with the final reorganization plan which Ethyl had approved and with which it did not interfere. Hence, there was no proximate relationship between the activities in question and Balter's alleged damages.

CONCLUSION

This Court has jurisdiction.

The Third District's decision not only creates confusion in rules of law but, more importantly, sanctions ruthless abuse of economic power and invites coercion and predatory tactics in commercial transactions in Florida.

This Court should therefore exercise its discretion, grant the writ, and review the case on the merits.

Respectfully submitted,

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And by /s/ _____
Jesse C. Jones

SUPREME COURT OF FLORIDA
WEDNESDAY, JANUARY 21, 1981

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION,

Respondent.

CASE NO. 59,795

District Court of Appeal
3rd District, Case No. 78-994

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, ACTING C.J., OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur

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CASE NO.80-1859

in the

Supreme Court

of the

United States

October Term, 1980

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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May 20, 1981

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STATEMENT OF THE CASE

Respondent, ETHYL CORPORATION,[1] (hereinafter referred to as ETHYL) sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the Petition for Writ of Certiorari filed by DAVID BALTER (hereinafter referred to as BALTER). ETHYL will, however, confine itself to a statement of facts relevant to determination of this Court's jurisdiction, in accordance with the applicable Federal Statutes and the Rules of the United States Supreme Court.

ETHYL, one of several defendants in the trial court proceedings, appealed to the District Court of Appeal of Florida, Third District, from a Final Judgment for damages entered in favor of BALTER. The judgment was entered on a jury verdict which, in answer to a special interrogatory, found that ETHYL had maliciously interfered with BALTER's advantageous business relations. Upon the conclusion that the evidence established as a matter of law that ETHYL committed no such tort, the District Court of Appeals of Florida, Third District, reversed the judgment below and ordered that judgment be entered for ETHYL (A.2-15).[2]

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[1]The Elk Horn Coal Corporation, a West Virginia corporation, is a subsidiary of ETHYL CORPORATION and is named herein in compliance with Rule 28.1 of the Rules of the United States Supreme Court.

[2]References in the following format, viz: (A.) are to the Appendix filed by BALTER as a part of his Petition for Writ of Certiorari.

BALTER moved for rehearing alleging, *inter alia*, that the District Court's reversal deprived BALTER of his constitutional right to trial by jury (A.16-35). Rehearing was denied by the District Court (A.36) and BALTER petitioned the Supreme Court of the State of Florida to grant a Writ of Certiorari on the alleged basis that the decision of the District Court was in conflict with previous decisions of the Supreme Court of the State of Florida and other Florida District Courts of Appeal (A.37). The Brief filed by BALTER in support of his petition to the Supreme Court of Florida also alleged deprivation of BALTER's asserted constitutional right to a jury trial (A.55).

The Supreme Court of the State of Florida declined to accept jurisdiction and denied the Petition for Review (A.60). BALTER now petitions this Court for Writ of Certiorari, pursuant to 28 U.S.C. §1257(3), on the basis of two rights ostensibly set up or claimed under the Constitution of the United States. The first claim, which has never been raised by BALTER prior to the instant Petition, is that Florida's system of territorially distinct courts deprives BALTER of his constitutional right to equal protection. The second claim is that the decision of the Florida District Court of Appeal, Third District, which reversed a jury verdict, deprived BALTER of his constitutional right to a jury trial.

SUMMARY OF ARGUMENT

The first claim, concerning BALTER's right to equal protection, has not been raised previously and may not, therefore, be raised for the first time in this Court. Furthermore, equal protection of the laws is not violated by a system of territorially distinct appellate courts. It is the well-established right of every state to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter and amount, and the finality and effect of their decisions.

The second claim, concerning alleged deprivation of a right to a jury trial, does not raise a constitutional issue which would vest this Court with discretionary jurisdiction under 28 U.S.C. §1257 (3). The Seventh Amendment to the Constitution of the United States is not applicable to the states through the due process clause of the Fourteenth Amendment and this Court has ruled that, without contravening either of those amendments, trial by jury may be modified by a state or abolished altogether.

There is no constitutional issue raised by BALTER that justifies the grant of a Writ of Certiorari.

ARGUMENT

I.

BALTER'S CLAIM TO DENIAL OF EQUAL PROTECTION HAS NOT BEEN RAISED OR DECIDED PREVIOUSLY AND IT MAY NOT, THEREFORE, BE RAISED IN THIS COURT FOR THE FIRST TIME.

Rule 23.1 (f) of the Supreme Court Rules requires a Petitioner seeking review of a judgment from a state court to show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on Writ of Certiorari. The Record before this Court is devoid of any reference to equal protection or to the structure of the court-system of the State of Florida. In fact, the federal question, which BALTER now asserts, was neither raised nor decided in the state courts and this alone, is fatal to BALTER's claim. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Missouri Pac. R. Co. v. Hanna*, 266 U.S. 184 (1924).

This Court has stated the rule succinctly:

> It is well established that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. *Wilson v. Aiken Industries, Inc.*, 439 U.S. 877 (1978).

Even though the fact pattern in *Aiken Industries, supra*, presented an egregious miscarriage of justice, this Court

declined to recede from the express requirements of Rule 23. The sound reasons underpinning these requirements were expressed in *Cardinale*:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And, in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. *Cardinale*, 394 U.S. at 439.

This Court should, therefore, deny this Petition, without reaching the merits of this issue, in light of BALTER's failure to accord to the State of Florida any opportunity to asses the constitutionality of its court system, a matter of considerable significance to, and great impact upon, the State of Florida.

This Honorable Court has consistently refused to decide federal constitutional issues raised for the first time in petitions for Writ of Certiorari to the state courts. This cause presents no exception and BALTER's Petition should, therefore, be denied.

In an abundance of caution, even though this Court should not reach the merits of the first claim asserted by BALTER, ETHYL will briefly address the equal protection issue.

Since this Court decided the lead case of *Missouri vs. Lewis*, 101 U.S. 22 (1880), this Court has consistently and repeatedly held that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature for all or any part of its territory. *North vs. Russell*, 427 U.S. 328 (1976); *McGowan vs. State of Maryland*, 366 U.S. 420 (1961); *Salsburg vs. State of Maryland*, 346 U.S. 545 (1954); *Griffin vs. County School Board of Prince Edward Co.*, 377 U.S. 232 (1964).

BALTER contends that the Florida Statutes establishing territorial subdivision in the Florida Appellate Court system have denied him his right of equal protection. This argument is not new and is uniformly rejected where the territorial distinctions serve some state interest and all people in the different jurisdictions are afforded equal treatment under the laws applicable in those jurisdictions. *Missouri vs. Lewis*, 101 U.S. 22 (1880). As this Court acknowledged in *Salsburg vs. State of Maryland*:

> [T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be denial to any person of the equal protection of the laws . . .
> It means that no persons or class of persons

> shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. 346 U.S. at 551.

More recently, the Court approved this analysis in *North vs. Russell*, again quoting the *Lewis* Court:

> Each State ... may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. 427 U.S. at 339.

The legal principles which govern the decisions to be made here have been well established by this Court, and the federal courts generally, for a period in excess of one hundred years. The State of Florida does not violate the Equal Protection Clause of the Fourteenth Amendment by establishing five Appellate Districts. The Equal Protection Clause relates to equality between persons as such, rather than between areas. Accordingly, on numerous occasions this Court has held that territorial uniformity is not a constitutional requisite. *Salsburg, supra*; *McGowan, supra*; *Lewis, supra.*

BALTER seeks to have this case reviewed on the basis of an issue which this Court has determined does not raise a constitutional question. As such, review is not available under 28 U.S.C. §1257 (3).

BALTER's reliance upon *Lindsey vs. Normet*, 405 U.S. 56 (1972), is misplaced. This Court held in *Lindsey* that when an appeal is afforded, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. The State of Florida has a uniform system of appeals and review available to all litigants.[3]

The first issue presented by BALTER fails to raise a constitutional question which would justify this Court's grant of a Writ of Certiorari to the Supreme Court of Florida. This Petition should, therefore, be denied.

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[3]See the provisions of the Constitution of the State of Florida, Article V, Sections 3(b) and 4(b), reproduced at Pages x through xii of the Petition filed by BALTER.

II.

THE FEDERAL CONSTITUTION DOES NOT GUARANTEE CIVIL LITIGANTS A JURY TRIAL IN STATE COURT.

Even though the record reflects that BALTER attempted to raise this issue in the state courts, nowhere does the Record show that the question was passed upon by either the Florida District Court of Appeal or the Supreme Court of Florida. This showing must be made by BALTER, before he is in compliance with Rule 23 of the United States Supreme Court Rules. This Court has held that the federal question must be raised *and* decided in the State Court and, if both of these do not appear on the record, the jurisdiction of this Court fails. *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Assuming, *arguendo*, that this Court may overcome said failure of jurisdiction, BALTER's assertions are still to no avail. As BALTER acknowledges, this Court has consistently refused to rule that preservation of civil jury trial is an essential element of ordered liberty required of the states by the due process clause of the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319 (1937); *Hardware Dealers' Mutual Fire Ins. Co. vs. Glidden Co.*, 284 U.S. 151 (1931); *Fay v. People of State of New York*, 332 U.S. 261 (1947).

The Court has steadily ruled that:

> [T]he commandments of the Sixth and Seventh Amendments, which require jury trial in criminal

> and certain civil cases, are not picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether.' (citation omitted) *Fay*, 332 U.S. at 288.

BALTER's reliance upon the Seventh Amendment to the United States Constitution is, therefore, misplaced.

Furthermore, this Court has not shown any inclination in more recent cases to place any additional constitutional restrictions upon the states, in connection with civil jury trials. *Alexander v. Virginia*, 413 U.S. 836 (1973). In *Alexander*, this Court held that trial by jury was not constitutionally required in state civil proceedings. This holding acknowledges and follows the well-considered decisions of a long list of distinguished jurists who have declined to command total incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment.[4]

During the Federal Convention, trial by jury in civil cases was touched upon in debate but was intentionally left out of the final document, probably because of the great diversity in state civil practice.[5] Additionally, it

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[4]Mr. Justice Matthews in *Hurtado v. California*, 110 U.S. 516 (1884); Mr. Justice Cardozo, in *Palko v. Connecticut*, 302 U.S. 319 (1937); Mr. Justice Harlan, in *Duncan vs. Louisiana*, 391 U.S. 145 (1968); and many others.

[5]See *Henderson*, The background of the Seventh Amendment, 80 Harv. L. Rev. 289, 292-4 (1966). See also *The Federalist* No. 83, at 524 (Wright, 1st ed. 1961) (Hamilton).

is paradoxical and anachronisitic to assert that the civil jury of 1791 is necessary to assure fair trials in suits at common law in this country when civil juries have been all but done away with in England, the source of the common law.[6]

The question of the applicability of the Seventh Amendment provisions to the states through the Due Process Clause of the Fourteenth Amendment was squarely raised in *Walker vs. Sauvinet*, 92 U.S. 90 (1876). To a claim that the Seventh Amendment applied to the states, the Court responded with language which has been the governing law ever since:

> [A]rt. seven of the Amendments ... relates only to trials in the courts of the United States ... The States so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. 92 U.S. at 92.

For one hundred years, the Supreme Court has not deviated from *Walker u Sauvinet*. Indeed, the Supreme

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[6]Jackson The Machinery of Justice in England, P 64 (1960). See also, Devlin, Trials by Jury, 130-133 (1956).

Court has frequently denied certiorari in cases involving the precise issues raised in the instant case.[7]

As Mr. Justice Cardozo, speaking for the Court, declared;

> Few would be so narrow or so provincial as to maintain that a fair and enlightened system of justice would be impossible without [the right to trial by jury]. *Palko v. Connecticut*, 302 U.S. at 325.

In agreement with Mr. Justice Cardozo, Mr. Justice Harlan observed:

> Neither history, nor sense, supports using the Fourteenth Amendment to put the States in a constitutional straitjacket with respect to their own development in the administration of criminal or civil law. *Duncan v. Louisiana*, 391 U.S. at 175.

More recently, when this Court was presented with the question of a juvenile's right to jury trial, the Court held that due process did not require a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). This holding vividly illustrates the fact that the right to

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[7]See, *Parsons v. Gulf*, 389 U.S. 896 (1967; *Jones v. Aetna*, 389 U.S. 990 (1967); *Mayes v. McKeithern*, 396 U.S. 868 (1969); *Marshall v. Southern Farm Bureau Casualty Co.*, 393 U.S. 883 (1968); *King v. Vico*, 385 U.S. 841 (1966); *Broussard v. State Farm*, 386 U.S. 909 (1967); *Sule v. Mo. Pac. R.R. Co.*, 385 U.S. 819 (1966); *Barry v. Aetna*, 401 U.S. 1005 (1971).

jury trial is not so "fundamental to the American scheme of justice" as to be required at all times, in a certain form, or in all types of cases.

The Court has expressed the sound federal principal underlying the Court's refusal to apply the restrictions of the Seventh Amendment to the states;

> [I]t suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931).

As long as this Court declines to accept the total incorporation doctrine, there is no rational basis for asserting that due process requires a jury in common law cases in state courts, but that a jury may be dispensed with in equity, admiralty, and numerous types of cases based on statutory causes of action. In sum, there is no reason for this Court to accept BALTER's invitation to recede from established precedent which has served well the ends of justice in this nation for a period of time in excess of a century.

Furthermore, this cause was tried to a jury and the Florida District Court of Appeal reversed upon the conclusion that the evidence established as a matter of law that ETHYL did not commit the tort complained of. Even in the federal courts such a reversal would be

permitted.[9] The findings of a jury are not so sacrosanct that they must stand, however unfounded and erroneous.

The cases relied upon by BALTER are criminal cases, which are not appropriate authority for the radical change which BALTER now advocates. BALTER's emphasis on the historical environment of trial by jury and his reference to its English ancestry is also misdirected, in view of the fact that in England the civil jury has virtually vanished.[10]

It is apparent that BALTER has failed to set up or claim any right, privilege or immunity under the Constitution of the United States of which this Court may take cognizance. The Petition for Writ of Certiorari should therefore be denied.

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[9] Under the Federal Rules of Civil Procedure, the trial judge may grant an new trial, direct a verdict, enter summary judgment and judgment notwithstanding the verdict. All of these require factual review and the Circuit Courts of Appeal are permitted no less latitude. See, *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[10] See note 6, supra.

CONCLUSION

Neither of the issues presented by BALTER justifies this Court's exercise of jurisdiction under 28 U.S.C. §1257(3) or Rule 23 of the Rules of the United States Supreme Court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

BRITTON, COHEN, KAUFMAN,
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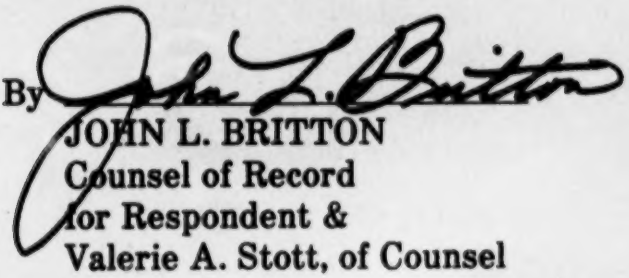
By 
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FILED
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ALEXANDER L. STEVAS,

CASE NO. 1859

in the

Supreme Court

of the

United States

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Florida

PETITIONER'S REPLY

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ARGUMENT

I

THE ISSUES ARE PROPERLY BEFORE THIS COURT

Contrary to the assertions in the briefs of respondent Ethyl Corporation and of the State of Florida as amicus curiae, the issues presented by David Balter's petition for certiorari are properly before this Court.

Two questions are presented:

1) Whether Florida's failure to provide an appeal as of right to its Supreme Court when its District Courts of Appeal adopt conflicting substantive rules of law violates the equal protection clause; and

2) Whether this Court should hold the right to a civil jury trial applicable to the states.

Both Ethyl and the State concede that the latter question was properly presented below.[1] They assert, however, that Balter did not argue or plead the equal protection clause below, and that this precludes this Court's granting the petition.

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[1]Ethyl purports to argue that while Balter timely and properly raised the Seventh Amendment in objection to the Florida Third District Court of Appeal's re-evaluation of the facts, "nowhere does the record show that the question was passed upon. . . ." The question was raised at the earliest opportunity, and was necessarily decided.

The equal protection violation resulted from the Florida Supreme Court's refusal to resolve the conflict in substantive law. The very constitutional infirmity of which Balter complains here denied him any opportunity to raise this objection below.[2] Florida's Third District chose to adopt a substantive rule of law contrary to that of Florida's Second and Fifth Districts. Balter's sole redress was to seek review (as a matter of "grace") in the Florida Supreme Court. The only issue Balter was permitted to address in the Florida Supreme Court was whether there was a conflict in precedents. The Florida Supreme Court does not hear constitutional claims, unless a district court of appeal "expressly" addresses such a question in an opinion. *Fla. Const.* art. V, §3(b)(3) (1968 Revision as amended 1980). The Florida Supreme Court's denial of Balter's petition for review was not subject to a motion for rehearing. Fla.R.App.P.9.330(d).

Balter therefore has submitted the issue at the earliest opportunity, and this Court can and should exercise jurisdiction. *See Saunders v. Shaw*, 244 U.S. 317, 320 (1917) ("But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here."). *See also Herndon v. Georgia*, 295 U.S. 441

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[2]Moreover, this Court is not precluded from deciding issues not presented below. *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 1471 n. 2 (1980); *Vance v. Terazas*, 444 U.S. 252, 100 S.Ct. 540, 544 n. 5 (1980).

(1935); *Great Northern R. Co. v. Sunburst Oil Co.*, 287 U.S. 358 (1932).

Ironically, the State argues that the petition should be denied on the basis of "adequate and independent state grounds." According to the State, the decision below was solely a determination of state substantive law. Balter's petition is not based on a misapplication of state law. The petition is based upon the fact, resulting from Florida's appellate structure, that there is no longer such a thing as Florida law. There is only the law of the Third District, the law of the Second District, *et cetera.*

II

FLORIDA'S FAILURE TO PROVIDE AN APPEAL AS OF RIGHT TO ITS SUPREME COURT WHEN ITS DISTRICT COURTS ADOPT CONFLICTING SUBSTANTIVE RULES OF LAW VIOLATES EQUAL PROTECTION.

The "law of Florida" no longer exists. Each district is free to develop its own substantive law, and excepting those cases which the Florida Supreme Court finds worthy of "grace," the conflicts cannot be resolved. Neither Ethyl nor the State even purports to suggest any rational basis for the resulting differences in substantive law. Ethyl responds simply that territorial distinctions are absolutely immune from equal protection analysis. And the State asserts that the system allows "litigants [to] obtain, without unreasonable delay and

expense, just judicial decisions of finality." Balter submits, for the reasons set forth in his petition, that neither argument can survive current equal protection analysis.

III

THIS COURT SHOULD HOLD THE RIGHT TO A CIVIL JURY TRIAL APPLICABLE TO THE STATES.

Ethyl and the State argue that the states are free to abolish civil jury trials. Ethyl cites the English abrogation of jury trial as authority. The State asserts that this Court cannot reconsider its decision in *Fay v. New York*, 232 U.S. 261 (1947).

The current British model has no authoritative value whatsoever. The seventh amendment affords the right to a civil jury trial *as it existed in 1791. United States v. Wonson*, 28 F.Cas. 745 (C.C.D. Mass. 1812).

This Court held in *Fay* that neither the sixth amendment nor the seventh amendment could apply to the states. *Fay* was overruled as to the Sixth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Balter submits, as set forth in his petition, that the Court should reconsider *Fay's* applicability to civil jury trials as well, in light of subsequent fourteenth amendment decisions.

CONCLUSION

For these reasons, the court should grant the petition for writ of certiorari.

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CASE NO. 80-1859

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION,

Respondent.

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1859

DAVID BALTER,

Petitioner,

vs.

ETHYL CORPORATION,

Respondent.

BRIEF OF AMICUS CURIAE
THE STATE OF FLORIDA

INTEREST OF AMICUS

The Attorney General of the State of Florida, pursuant to Rule 36.4, Rules of the Supreme Court of the United States, respectfully submits this brief on behalf of the State of Florida urging that this

Petition for Writ of Certiorari be denied.

The State of Florida, with twenty judicial circuits, five district courts of appeal and a state supreme court, wishes to preserve its judicial system in which litigants obtain, without unreasonable delay and expenses, just judicial decisions of finality.

SUMMARY OF ARGUMENT

Consistent with prior decisions of this Court, the Petition for Writ of Certiorari should be denied. Petitioner's equal protection attack on the Florida appellate review system, a system which closely resembles the federal system, was not presented to the state courts below. The attack is precluded for review by certiorari at this time.

Further, the district court's finding that the requisite elements of the tort of interference with contractual relationships were not present, and its reversal of the trial court's order because of that misapplication of state law, was consistent with the function and authority of a state appellate court. The reversal was based upon adequate and independent state grounds.

Finally, there is no substantial federal question raised. Petitioner was afforded a jury trial, a benefit for which there is no federal constitutional requirement. Florida's appellate structure which would allow the state's highest court to decline to review an appellate court decision reversing a trial court order on a matter of state law is a permissible product of state policy which

is consistent with constitutional equal protection requirements. Only invidious discrimination, wholly absent here, is prohibited. There is no constitutional requirement that a state adopt a unifying method of appeals which will insure the same decisions on particular questions which may arise within a state.

This Petition for Writ of Certiorari should be denied.

ARGUMENT

I. PETITIONER'S EQUAL PROTECTION ATTACK ON FLORIDA'S APPELLATE REVIEW SYSTEM WAS NOT RAISED IN THE STATE COURTS.

The issue posed by Petitioner in his initial argument for granting the Writ of Certiorari appears for the first time at the chronicle of litigation in his petition to this Court. That issue is not one which was presented below, hinted below, much less argued or decided below. The issue exists, at best, as a tangential collateral attempt to breathe life into an appeal which has run its natural and proper legal course to finality.

This untimely created issue is not properly before this Court. In Cardinale v. Louisana, 394 U.S. 437, 438-439 (1969) this Court was petitioned to hear an

attack on a Louisana criminal statute requiring that confessions be admitted into evidence. Although certiorari was granted, the fact emerged in oral argument that the issue had never been raised or decided in the state courts below. Citing a number of decisions on the point, this Court recognized its error in granting certiorari and stated that it has consistently refused to decide federal constitutional issues raised for the first time on its review of state court decisions.

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a

> federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds (citation omitted), they should be given the first opportunity to consider them.

See also Moore v. Illinois, 408 U.S. 786, 789; Beck v. Washington, 369 U.S. 541 (1962); Nelson v. County of Los Angeles, 362 U.S. 1 (1960); Edelman v. California, 244 U.S. 357 (1952); Rooker v. Fidelity Trust Co., 261 U.S. 114 (1923).

The conclusion which follows from Cardinale and its kin is entirely consistent with the requirements of this Court's jurisdictional statute, 28 U.S.C. §1257, under which review is sought by

Petitioner. The statute provides that "final judgments or decrees rendered by the highest court of a State in which a decision could be had (emphasis supplied) may[1] be reviewed by the Supreme Court." On the face of Petitioner's brief and in light of the argument presented above, it is apparent that no decision "could be had" by or from Florida's appellate courts on the issue here presented by

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[1]The non-mandatory nature of this statute is comparable to the 1980 Amendment to Article V, Section 3(b) of the Florida Constitution upon which certiorari was sought to the Florida Supreme Court. As noted by Petitioner, the resulting Appellate structure in Florida resembles the Federal appellate system in that the state District Courts of Appeal, like the Federal circuit courts, become the primary and, in most cases, the ultimate reviewing body for decisions of the trial courts.

the Petitioner for the simple reason that the Petitioner did not afford the Florida District Court of Appeal nor the Florida Supreme Court that opportunity.

Denial of the Petition should be granted accordingly.

II. THE PETITION FOR CERTIORARI PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

A. The Underlying Issue is a Determination of State Substantive Law.

The District Court's decision upon which this Petition for Certiorari is based derives not from characteristics of the Florida Appellate court system which Petitioner here attempts to put at issue. Rather, the decision derives from the District Court's interpretation of state law. In finding that "the evidence establishes as a matter of law that Ethyl committed no such tort" (Ethyl Corporation v. Balter, 386 So.2d 1220, 1221 (3rd DCA 1980)) the District Court had reviewed the elements of the tort of interference with contractual relationship under state court decisions.

This Court has historically held that review by it of decisions concerning non-federal or local matters is generally precluded. Neblett v. Carpenter, 305 U.S. 297 (1938); Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Wilson v. Loew's Inc., 355 U.S. 597 (1958); Fox Film Corp. v. Muller, 296 U.S. 207 (1935). The Supreme Court does not sit to determine matters of local law. Dixon v. Duffy, 344 U.S. 143 (1953). Certainly, the elements for the tort of interference of contract under Florida law are local matters which are properly and exclusively decided by the Florida Court.

Further, this Court has historically declined to review decisions of state courts which rest upon adequate and

independent state grounds. As stated in Herb v. Pitcairn, 324 U.S. 117, 125 (1944)

> The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they[2] incorrectly adjudge federal rights. And our power is to correct wrong judgments not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

The conclusion to decline federal review is appropriate here. The Florida

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[2]Conspicuously, Petitioner's claim in the state circuit court below was for interference with contract, obviously, a non-federal claim.

District Court applied state law to make the determination that the evidence before the state circuit court did not sustain the finding that the elements of the tort of interference with contract had been shown. The district court's conclusion and order are totally consistent with the power of an Appellate court to determine, as a matter of law, if the conclusion of the trial court represents a misapplication of the law governing the facts disclosed. Holland v. Gross, 89 So.2d 255 (Fla. 1956) 63 A.L.R.2d 920; Goldstein v. Goldstein, 310 So.2d 361 (3rd DCA 1975). The law governing the facts is the law in Florida for the tort attributed to Ethyl Corporation. The District Court found as a matter of law, that law was misapplied. Evaluations of

evidence reached by the application of erroneous legal standards are erroneous evaluations. Protective Committee for Independent Stock Holders of T.M.T. Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 445 (1968). Such evaluation would, as here, require reversal.

B. There is No Constitutional Right to Civil Jury Trial in State Court.

Petitioner's suggestion that the Florida District Court decision "deprived" him of "his constitutional rights to a jury trial" guaranteed under the Eighth Amendment to the United States Constitution is simply deficient as a means of sustaining this Petition. His suggestion presents no federal question. The Eighth Amendment speaks to courts of

"the United States", not to courts of the sovereign states. Even disregarding the fact that Petitioner had his jury trial before the state circuit court, there remains the uncontroverted fact that the federal constitution does not guarantee civil litigants a jury trial in state court. Fay v. New York, 232 U.S. 261 (1947). That conclusion is conceded by Petitioner. It necessarily follows that Petitioner's attempt to predicate a review by certiorari upon that alleged "deprivation" is foreclosed by the Fay decision for lack of legal controversy. The absence of a constitutional necessity for a jury trial having been decided by this Court, Petitioner's position advocating such a right is so devoid of legal merit as to require denial of his

Petition for Writ of Certiorari and to be unworthy and incapable of further decision by this Court. See Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902); Zucht v. King, 260 U.S. 174, 177 (1922); Hunter Company v. McHugh, 320 U.S. 222, 227 (1943).

C. The Equal Protection Clause Does Not Assure Uniformity of Judicial Decisions.

Petitioner's reliance on the equal protection clause is misplaced. Reduced to its basics, Petitioner's argument is that the Florida law concerning the tort of interference with contract was misapplied by the Florida district court and that the Florida Supreme Court's denial to review the purported misapplication requires that the Florida Appellate

system be stricken.[3] Petitioner's argument overlooks the fact that the Fourteenth Amendment to the United States Constitution does not assure uniformity of judicial decisions or immunity from judicial error. Beck v. Washington, 369 U.S. 541, 555 (1962); Milwaukee Electric Light Co. v. Wisconsin, 252 U.S. 100, 106 (1920). As recognized in Beck, "were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question."

In reviewing an attack on the Ohio judicial system, this Court observed in

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[3]The logical consequence of Petitioner's illogical argument is that the appellate system of virtually every state in the nation, as well as the ten circuit federal system, is constitutionally deficient due to the possibility of conflicting law coexisting within each system at a given moment.

Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 80 (1930)

> The provision of the State Constitution which is attacked is one operating uniformly throughout the entire state. The state has wide discretion in respect to establishing its systems of courts and distributing their jurisdiction. It has been held by this Court that the equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a state as to subject matter or finality of decisions if all persons within the territorial limits of the respective jurisdictions of the state courts have an equal right in like cases under like circumstances to resort to them for redress . . . . It is thus well established that there is no requirement of the federal constitution that the state shall adopt a unifying method of appeals which will insure to all litigants within the state the same decisions on particular questions which may arise.

Obviously, the State of Florida is free to limit the jurisdiction of its

Supreme Court in accordance with its state policy.

The equal protection standard by which Petitioner would gauge the Florida appellate system is too lofty and is without legal precedent. The equal protection clause relates to equality between persons rather than between areas, and territorial uniformity is not a constitutional prerequisite - only relevancy to the achievement of a legitimate state objective is required and only invidious discrimination is barred. See McGowan v. Maryland, 366 U.S. 420 (1961).

Because the relevancy of the Florida appellate structure to effective, efficient, and attainable judicial review is apparent from the provisions of the Florida Constitution, Article V, Section

3(b) (1968 Revision as amended 1980) and because there exists no showing of invidious discrimination, the Florida appellate system which Petitioner would strike exceeds the required standard.

CONCLUSION

Balter's Petition for Writ of Certiorari presents no issue capable or worthy of review. Denial of the Petition is, accordingly, appropriate.

Respectfully submitted,

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